SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 142

NOAH STEWART, APPELLANT,

vs.

ROBERT KEYES, T. B. SLICK, D. REPLOGLE, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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IN SUPREME COURT OF OKLAHOMA

No. 21,718

NOAH STEWART, Plaintiff in Error,

vs.

ROBERT KEYES et al., Defendants in Error,

Syllabus

1. The statutes of limitations provided in Sections 100 and 1444, O. S. 1931, and the second subdivision of Section 99, O. S. 1931, apply regardless of whether the guardian's deed was valid, void, or voidable.

2. The recording of a deed to real property made by a guardian in pursuance of a sale upon an order of a court directing such sale, is sufficient to set the statute of limitations in operation against the ward.

3. An action for the recovery of real property sold by a guardian upon an order of court directing such sale, brought by the ward, can only be commenced within five years after the date of the recording of the deed made in pursuance of the sale, within three years after the disability of the ward is removed, and within three years after the termination of the guardianship.

Error from the District Court of Seminole County, Oklahoma

Hon. Lucius Babcock, Judge

Affirmed.

W. H. Ballard, Lester & Briggs, for Plaintiff in error.

T. H. Wren, Grant & Grant, W. W. Stokes, A. M. Beets, O. K. Wetzel, John Rogers, J. C. Denton, R. H. Wills, J. H. Crocker, I. L. Lockewitz, J. P. Greve, R. J. Roberts, for Defendants in error.

[fol. 2] OPINION—Filed Feb. 20, 1934

ANDREWS, J:

This is an appeal from a judgment rendered by the district court of Seminole County in favor of the defendants in error, who were the defendants in the trial court, against the plaintiff in error, who was the plaintiff therein. Hereinafter the parties will be referred to as they appeared in the trial court.

The plaintiff's original petition was filed on April 11, 1928. The cause of action attempted to be stated therein was based on the allegations that the appointment of John A. Jacobs as guardian for him was invalid; that the continuation of such guardianship after the plaintiff had reached the age of majority was invalid, and that the sale of the land in question by the guardian was invalid. Thereafter various amendments were filed.

Since the controlling issue is whether or not that guardian's deed can be attacked herein, the details of the allegations of the petition and amendments are not stated.

The record shows that on July 20, 1909, John A. Jacobs was regularly appointed guardian of the property of the plaintiff who, at the time of the appointment, was a minor. It shows that on the 5th day of January, 1914, after the plaintiff had arrived at the age of majority, said John A. Jacobs presented to the county court a resignation as guardian; that the county court found that the plaintiff, a full-blood Indian and of a weak and inferior mind, was unable to properly transact his own business and incompetent to manage his own affairs; that the said John A. Jacobs was a capable person to be continued as guardian of the plaintiff; that after an examination of the plaintiff and after a hearing in the presence of the plaintiff, the resignation of the guardian was not accepted and it was ordered that the guardianship continue with John A. Jacobs as guardian until the further order of the court. The record does not [fol. 3] show the character of notice of that hearing, if any; and it might be presumed that the necessary notice was given before the order was made. However, we are not determining that question herein. The record shows that thereafter the land in question was sold at a guardian's sale and purchased by the defendant, Robert Keyes, who entered into possession thereof and who remained in posses-

sion thereof at all times thereafter, and under whom the other defendants in this action claimed title to their respective interests in the property in question. That guardian's deed was filed for record on the 12th day of July, 1916. On August 4, 1917, the county court made an order adjudging the plaintiff to be competent and discharging the guardian. There was other evidence pertaining to other issues not controlling herein.

At the conclusion of the evidence on behalf of the plaintiff, the defendants, jointly and severally, demurred thereto on the ground, among others, that each and every cause of action asserted by the plaintiff in the case, as shown by the evidence, was barred by the statutes of limitation of the state of Oklahoma and the United States of America. That demurrer was sustained by the trial court and judgment was rendered dismissing the action with prejudice. From that judgment the plaintiff appealed to this court.

Under the provisions of Section 1444, O. S. 1931, no action for the recovery of any estate, sold by a guardian, can be maintained by the ward, unless it is commenced within three years next after the termination of the guardianship, or when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof. The plaintiff could have commenced his action at any time within three years after August 4, 1917. Under the provisions of Section 100, O. S. 1931, any person entitled to bring an action for the recovery of real property, who may [fol. 4] be under any legal disability when the cause of action accrues, may bring his action within two years after the disability is removed. Under that statute the plaintiff could have brought his action within two years after August 4, 1917. Under the provisions of the second subdivision of Section 99, O. S. 1931, an action for the recovery of real property sold by a guardian, upon an order or judgment of a court directing such sale, brought by the ward or his guardian, must be brought within five years after the date of the recording of the deed made in pursuance of the sale. Under that statute the plaintiff could have brought his action within five years after the 12th day of July, 1916. The action was not commenced until the 11th day of April, 1928.

The plaintiff contends that this action was brought under the provisions of Section 2, Chapter 115 of the Act of Congress of April 12, 1926 (44 Stat. 239), generally known as the Hastings-Harreld Act; that it was brought within the two-year period provided by that act, and that the restrictions provided in Section 1444, O. S. 1931, as to attacks on guardians' sales do not apply. With that contention we cannot agree.

In Campbell v. Holt, 115 U. S. 620, 29 L. Ed. 483, 6 Sup. Ct. 209, the Supreme Court of the United States said:

"It may, therefore, very well be held that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff, would be to deprive him of his property without due process of law."

[fol. 5] The Hastings-Harreld Act, supra, did not and could not affect causes of action that had been barred by the statutes of limitation prior to the enactment thereof. See 17 R. C. L., section 16, page 674; 34 Corpus Juris, section 14, page 697.

The right of the plaintiff to have the guardian's deed in question canceled was barred by the applicable statutes of limitation prior to the commencement of this action, even though, as contended by the plaintiff, that deed was void. See Dodson v. Middleton, et al, 38 Okla. 763; Group v. Jones, 44 Okla. 344, 144 Pac. 377; King v. Mitchell, 69 Okla. 207, 171 Pac. 725; Chupco, et al, v. Chapman, et al, 76 Okla. 201, 170 Pac. 259; Glory v. Bagby, et al, 79 Okla. 155, 188 Pac. 881; Wray v. Howard, 79 Okla. 223, 192 Pac. 584; Mehard v. Little, 81 Okla. 1, 196 Pac. 536; Minnehart v. Littlefield, 94 Okla. 249, 222 Pac. 253; Sandlin v. Barker, 95 Okla. 113, 219 Pac. 519; Walker v. Hatcher, et al, 109 Okla. 283, 231 Pac. 88; Dierks, et al, v. Isaac, et al, 114 Okla. 158, 244 Pac. 750; Anicker, et al, v. Harrison, et al, 125 Okla. 21, 256 Pac. 39; Tiger v. Brown, 130 Okla. 83, Pac. 124; Stolfa v. Gaines, et al, 140 Okla. 292, 283 Pac.

563; Bearhead v. American Inv. Co., 157 Okla. 84, 10 Pac. (2d) 1086; Washington v. Bartlett, 158 Okla. 218, 13 Pac. (2d) 132; Givens v. Jones, et al, 158 Okla. 124, 12 Pac. (2d) 892; Deere v. Gypsy Oil Co., 160 Okla. 237, 15 Pac. (2d) 1086; Harris, et al, v. Bell, et al, 254 U. S. 103, 65 L. Ed. 159, 41 Sup. Ct. 49.

In Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807, the Supreme Court of the United States said:

"Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together."

[fol. 6-9] There are many other issues presented, none of which are necessary to be determined.

The judgment of the trial court is affirmed.

Cullison, V. C. J., and Swindall, Osborn and Busby, JJ., concur.

[fols. 10-143] In Supreme Court of Oklahoma

* * * * * * *

21718

Noah Stewart

v.

Robert Keyes, et al.

Order Denying Rehearing—March 27, 1934

And now on this day it is ordered by the court that the petition for rehearing filed in the above entitled cause be, and the same is hereby denied.

* * * * * * *

[fol. 144] IN DISTRICT COURT OF SEMINOLE COUNTY

No. 11,559

NOAH STEWART, an Incompetent, by His Legal Guardian, R. L. Ream, Plaintiff,

vs.

ROBERT KEYES et al., Defendants

SEPARATE ANSWER AND CROSS-PETITION OF DEFENDANTS, MID-CONTINENT PETROLEUM CORPORATION AND COSDEN OIL & GAS COMPANY—Filed June 8, 1929

Come now the above named defendants, Mid-Continent Petroleum Corporation and Cosden Oil & Gas Company, and each for its separate answer to the second amended petition of the above named plaintiff and each of the causes of action attempted to be set up and stated therein, and each for its cross petition, alleges, states and denies:

That said defendants expressly and specifically deny each and every allegation set out, stated and contained in the [fol. 145] aforesaid second amended petition of the above named plaintiff and in each of the several causes of action attempted to be set up and stated therein, save and except as is hereinafter expressly and specifically admitted or qualified.

That said defendant, Mid-Continent Petroleum Corporation, is the absolute owner and holder of a good, valid and subsisting oil and gas mining lease covering the following described real estate and premises, to wit:

The Southwest Quarter (SW/4 of Section Four (4), Township ten (10) North, Range Eight (8) East, containing 160 acres, more or less, situated in Seminole County, Oklahoma,

and is in the quiet and peaceable possession of said real estate and premises under said oil and gas mining lease and is entitled to such possession, and that said defendant's title to the aforesaid lease, and its possession and right to the possession of the aforesaid real estate and premises under the aforesaid lease are predicated upon the following matters and things, to wit:

(a) That one Lizzie Toney was a Creek Indian Citizen and was living on the 1st day of April, 1899, and as such she was enttiled to be enrolled on the final rolls of the Creek Tribe of Indians, and that she died some time during the month of October 1899, in the town of Wewoka, Indian Territory, and that she was at the time of her death a resident of and domiciled in the territory now embraced [fol. 146] in Seminole County, Oklahoma, and that she died prior to having been either enrolled or allotted her distributive share of the lands of the Creek Nation.

(b) That thereafter application was made for the enrollment of the said Lizzie Toney, deceased, as a citizen by blood of the Creek Nation, and on the 24th day of May, 1901, she was duly enrolled as such on Creek Census Card No. 2987 opposite Roll No. 8540 as a full blood Creek Indian; and thereafter on the 13th day of January, 1902, a certificate of allotment was duly issued to the heirs of the said Lizzie Toney, deceased, covering the above described real estate and premises as and for the distributive share of the lands of the Creek Nation to which she was entitled to be allotted; and that thereafter a patent or patents were issued to the heirs of the said Lizzie Toney, deceased, leaving at large the names and individuals identity of such heirs.

(c) That the said Lizzie Toney died intestate, unmarried and without children her surviving, but left surviving her as her sole and only heirs at law three (3) grandchildren, to wit: Ida Kernell, now Bruner, Selina Davis and Noah Stewart; and that upon the issuance of the aforesaid allotment certificate to the heirs of the said Lizzie Toney, the said Ida Kernell, now Bruner, Selina Davis and Noah Stewart became seized of an undivided one-third (⅓) interest each in and to the above described real estate and premises.

(d) That the said Selina Davis was a citizen of the Creek Nation duly enrolled as such opposite Roll No. 5997 [fol. 147] as a full blood Creek Indian, and that on the 15th day of November, 1899, she died in infancy, intestate, unmarried and without issue surviving her, leaving as her sole and only heir at law her father, Sam B. Davis, a full blood Creek Indian citizen duly enrolled as such opposite Roll No. 7855, and who upon the death of the said Selina

Davis became seized of all her right, title, interest, equity and estate in and to the above described real estate and premises.

(e) That the aforesaid Ida Bruner, nee Kernell, is a three-fourths (¾) blood Creek Indian citizen, enrolled as such opposite Roll No. 5996, and that on the 3rd day of February, 1911, the said Ida Bruner, nee Kernell, joined by her husband, Dave Bruner, sold and conveyed by warranty deed to Robert Keyes all her right, title, interest, equity and estate in and to the above described real estate and premises, which said deed is of record in the office of the County Clerk of Seminole County, Oklahoma, in Book 15 of Deeds at page 536, which record is hereby referred to for identification and made a part hereof.

(f) That on the 6th day of February, 1911, the said Robert Keyes, joined by his wife, sold and conveyed to M. O. Brice all of his right, title, interest, equity and estate in and to the above described real estate and premises, and the deed by and under which said conveyance was made is of record in the office of the County Clerk of Seminole County, Oklahoma, in Book 19 of Deeds at page 35, which [fol. 148] record is hereby referred to for identification and made a part hereof.

(g) That on the 3rd day of December, 1913, the aforesaid Sam B. Davis, father of the aforesaid Selina Davis, deceased, sold and conveyed by quit claim deed to M. O. Brice all of his right, title, interest, equity and estate in and to the above described real estate and premises; that the aforesaid deed was duly and regularly approved on the 3rd day of December, 1913, by the Judge of the County Court of Seminole County, Oklahoma, and thereafter, on the 6th day of August, 1924, said deed was duly and regularly approved by the County Judge of Hughes County, Oklahoma; that the aforesaid deed is of record in the office of the County Clerk of Seminole County, Oklahoma, in Book 26 of Deeds at page 596, which record is hereby referred to for identification and made a part hereof; that the order of the County Court of Seminole County, Oklahoma, approving the aforesaid deed is of record in the office of the County Clerk of Seminole County, Oklahoma, in Book 37 at page 204, which record is hereby referred to for identification and made a part hereof; and that the

order of the County Court of Hughes County, Oklahoma, approving the aforesaid quit claim deed is of record in the office of the County Clerk of Seminole County, Oklahoma, in Book 170 at page 585, which record is hereby referred to for identification and made a part hereof.

(h) That on the 8th day of January, 1914, M. O. Brice sold and conveyed by general warranty deed to Robert Keyes all of his right, title, interest, equity and estate in and [fol. 149] to the above described real estate and premises, which said deed is of record in the office of the County Clerk of Seminole County, Oklahoma, in Book 19 of Deeds at page 257, which record is hereby referred to for identification and made a part hereof.

(i) That on the 11th day of July, 1916, John A. Jacobs, as the guardian of the estate of Noah Stewart, an incompetent, by guardian's deed conveyed to the said Robert Keyes all of the right, title, interest, equity and estate of the said Noah Stewart in and to the above described real estate and premises, which said guardian's deed is of record in the office of the County Clerk of Seminole County, Oklahoma, in Book 7 at page 407, which said record is hereby referred to for identification and made a part hereof; that said guardian's deed was made pursuant to an order confirming the sale of the real estate and premises mentioned and described therein, which was made and entered in the County Court of Hughes County, Oklahoma, on the 11th day of July, 1916, a certified copy of which said order is of record in the office of the County Clerk of Seminole County, Oklahoma, in Book 58 at page 492, which said record is hereby referred to for identification and made a part hereof; that the aforesaid sale of the said real estate and premises was made upon a verified petition of the said guardian filed in the probate matter of the said Noah Stewart, an incompetent, same being probate case No. 524 in the County Court of Hughes County, [fol. 150] Oklahoma, and pursuant to the decree of sale made and entered by said Court in said case on the 9th day of June, 1916; that the aforesaid sale was made by said guardian under the aforesaid decree of sale after proper and legal notice, giving the time and place of said sale; and that the aforesaid Robert Keyes became the purchaser of the interest of the aforesaid ward in and to the above mentioned and described real estate and premises and as

hereinbefore set forth in the aforesaid order of confirmation and the aforesaid guardian's deed.

(j) That on the 4th day of August, 1917, the aforesaid Noah Stewart was duly and legally restored to competency by a proper order and decree of the County Court of Hughes County, Oklahoma, the same being the Court having jurisdiction of his person and estate, in the aforesaid probate case No. 524.

(k) That on the 26th day of August, 1924, the aforesaid Noah Stewart, for a good and valuable consideration, sold and conveyed by warranty deed to the aforesaid Robert Keyes all of his right, title, interest, equity and estate in and to the above described real estate and premises; that said deed was duly approved by the Judge of the County Court of Seminole County, Oklahoma, on the 27th day of August, 1924, and was also duly approved by the Judge of the County Court of Hughes County, Oklahoma, on the 27th day of August, 1924, and that the aforesaid deed and the aforesaid orders are of record in the office of the County Clerk of Seminole County, Oklahoma, in Book 166, at page 487, Book 171 at page 409 and Book 171 at [fol. 151] page 425, respectively, and said records are hereby referred to and made a part hereof.

(l) That on the 7th day of July, 1920, the aforesaid Robert Keyes and Lola Keyes, his wife, for a good and valuable consideration, made, executed, acknowledged and delivered to said defendant, Cosden Oil & Gas Company, their certain oil & gas mining lease covering the above described real estate and premises; that on the 28th day of July, 1920, said lease was filed for record and recorded in Book 101 at page 193 of the records of the County Clerk of Seminole County, Oklahoma, a copy of which lease is hereto attached, marked "Exhibit 1" and made a part hereof; that the aforesaid lease is and has been at all times subsequent to the 7th day of July, 1920, in full force and effect and is a good, valid and subsisting oil and gas mining lease upon the real estate and premises mentioned and described therein; and that thereafter said oil and gas lease passed from the defendant, Cosden Oil & Gas Company, by duly made, executed and delivered assignments to the defendant, Mid-Continent Petroleum Corporation, and that by virtue of said assignments the Mid-Continent Petroleum

Corporation is the absolute owner and holder of said lease, and is in the quiet and peaceable possession of the real estate and premises mentioned and described therein, and is entitled to such possession.

That said defendants expressly and specifically deny that said plaintiff, Noah Stewart, is an incompetent person, and state and allege that the said Noah Stewart is and has [fol. 152] been at all times since the 4th day of August, 1917, of sound mind and thoroughly competent to transact any and all business; and said defendants further expressly and specifically deny that R. L. Ream is now and ever was the duly appointed, qualified and acting guardian of the person and estate of the said plaintiff, Noah Stewart, and state and allege that the order of the County Court of Seminole County, Oklahoma, purporting to appoint the said R. L. Ream as guardian of the person and estate of the said Noah Stewart, and the proceedings had in connection therewith, disclose that said County Court of Seminole County, Oklahoma, never at any time acquired jurisdiction, authority or power to make said order, and that said attempted and purported appointment was and is absolutely null and void.

That said defendants further state and allege that the plaintiff, Noah Stewart, is not now and never was a resident of Seminole County, Oklahoma.

That said defendants further state and allege that the above mentioned and described attempted appointment of R. L. Ream as guardian of the person and estate of the plaintiff, Noah Stewart, is and was the result of a conspiracy on the part of said R. L. Ream, W. H. Ballard and Tom Huser, his attorneys in this action, and divers other persons whose names are unknown to said defendants, for the sole and only purpose of making it appear to this court that the said Noah Stewart was an incompetent person, [fol. 153] when in truth and in fact the said Noah Stewart is and has been at all times since the 4th day of August, 1917, of sound mind and thoroughly competent to transact any and all business and to manage and conduct his affairs, all of which is and was at the time of said attempted appointment of guardian well and thoroughly known to the said R. L. Ream, W. H. Ballard and Tom Huser, and the aforesaid divers and sundry persons.

That said defendants admit that John A. Jacobs was duly and legally appointed guardian of the person and es-

tate of Noah Stewart by the County Court of Hughes County, Oklahoma, in Probate Case No. 524 in said court.

That said defendants further state and allege that on the 11th day of July, 1916, when John A. Jacobs, as guardian of the estate of Noah Stewart, an incompetent, made, executed, acknowledged and delivered his guardian's deed to the defendant, Robert Keyes, covering all of the right, title, interest, equity and estate of the said Noah Stewart in and to the real estate and premises involved herein, as has heretofore been mentioned and described, and at the time of all of the proceedings which were had in connection with said guardian's deed, the said John A. Jacobs was the duly appointed, qualified and acting guardian of the estate of the said Noah Stewart, and that said guardian's deed, and all of the proceedings had in connection therewith, and each and every part thereof, were in accordance with the laws of the State of Oklahoma, in such cases made and provided.

[fol. 154] That said defendants expressly and specifically deny that there was any fraud, either actual or constructive, in connection with the warranty deed covering the real estate and premises involved herein, which was made, executed, acknowledged and delivered by Noah Stewart to Robert Keyes on the 26th day of August, 1924, and which is recorded in Book 166 at page 487 of the records of the County Clerk of Seminole County, Oklahoma, and state and allege that said deed was made, executed, acknowledged and delivered by the said Noah Stewart of his own free will and accord and for a good and valuable consideration, and that at said time the said Noah Stewart fully and completely understood, realized and comprehended the nature, force and effect of said deed.

That said defendant, Mid-Continent Petroleum Corporation, and those through whom it claims, have been in the actual, open, notorious, hostile and adverse possession of the real estate and premises involved herein continuously from on or about the 13th day of January, 1902, down to the present time, and that during all of said times said defendant, and those through whom it claims, have claimed to be the absolute owner and holder of the legal and equitable title in and to said real estate and premises, and that said possession and said claim or claims have at all times been predicated upon color of title, and said defendant,

and those through whom it claims, have during the whole of the aforesaid time collected and used, and are now collecting and using the rents, profits and issues from said [fol. 155] real estate and premises.

That said answering defendants, nor either of them, had any notice prior to the institution of this suit that the above named plaintiff claimed any right, title, interest, equity or estate in and to the real estate and premises involved herein adverse to those by, through and under whom said answering defendants, and each of them, claim, and that said defendant, Cosden Oil & Gas Company, purchased the above mentioned and described oil and gas mining lease for a good and valuable consideration, without any notice of any defects or imperfections therein or in connection therewith, and that it purchased said lease in good faith, and was at all times while holding said lease an innocent purchaser and holder thereof for value, and that the defendant, Mid-Continent Petroleum Corporation, in taking its assignment of said lease, as pleaded above, had no notice that the above named plaintiff claimed any right, title, interest, equity or estate in and to the real estate and premises involved herein, and that said defendant, Mid-Continent Petroleum Corporation, purchased said lease for a good and valuable consideration, without any notice of any defects or imperfections therein or in connection therewith, and that said defendant purchased said lease in good faith, and is now, and has at all times been an innocent purchaser and holder thereof for value.

That a certified copy of the above mentioned and described order of the County Court of Hughes County, [fol. 156] Oklahoma, confirming the sale of the real estate and premises involved herein by John A. Jacobs, as guardian of the above named plaintiff, to Robert Keyes, was filed for record and recorded in Book 58 at page 492 of the records of the County Clerk of Seminole County, Oklahoma, on the 11th day of July, 1916; and that the above mentioned and described guardian's deed from the aforesaid John A. Jacobs, as guardian of the above named plaintiff, to the aforesaid Robert Keyes, which was made, executed, acknowledged and delivered pursuant to the aforesaid order of confirmation, was filed for record and recorded in Book 7 at page 407 of the records of the County Clerk of Seminole County, Oklahoma, on the 12th day of July, 1916.

That said answering defendants further state and allege that the above named plaintiff received from John A. Jacobs, purporting to act as guardian of his estate, the consideration received by the said John A. Jacobs from the above named Robert Keyes for the above mentioned and described guardian's deed, as well as other sums of money which were received by the said John A. Jacobs, as the guardian of said plaintiff, and that in doing so said plaintiff had full, complete and accurate knowledge of the aforesaid guardian's deed and of each and all of the probate proceedings had in the County Court of Hughes County, Oklahoma, in connection therewith, and of the source of said moneys, and that after having received said moneys said plaintiff voluntarily used and expended the same for his own personal needs and purposes, and that [fol. 157] therefore said answering defendants state and allege that said plaintiff, by his aforesaid acts and conduct, as well as other acts and conduct, has ratified, approved and confirmed the aforesaid guardian's sale and the aforesaid guardian's deed, and has adopted said guardian's deed as his own deed, and is and should be equitably estopped from claiming or asserting that said guardian's deed is nor was invalid.

That subsequent to the 26th day of August, 1924, the defendant, Mid-Continent Petroleum Corporation, in reliance upon the public records pertaining to the real estate and premises involved herein, and believing that the above mentioned and described oil and gas mining lease was a good, valid and subsisting lease according to the terms, conditions and provisions thereof and that it was the absolute owner and holder thereof, went upon the said real estate and premises involved and drilled a well thereon for oil and gas purposes, and that since that time said defendant has drilled a large number of oil and gas wells upon said premises, and has been operating said wells and producing and selling oil and gas therefrom, and that in so doing said defendant has in good faith expended many thousands of dollars; that the above named plaintiff at all times had full, complete and accurate knowledge of the acts and conduct of said defendant, Mid-Continent Petroleum Corporation, upon and in connection with the aforesaid real estate and premises, of its use and occupation thereof, and of the expenditure by it of the afore-

[fol. 158] said many thousands of dollars; but that notwithstanding the same, said plaintiff stood idly by and never until the time of the filing of this suit made, asserted or claimed any right, title, interest, equity or estate in and to said real estate and premises; and said answering defendants state and allege that said plaintiff was guilty of laches in instituting this action, and that his acts and conduct in not objecting to the operation and development of the aforesaid real estate and premises by the defendant, Mid-Continent Petroleum Corporation, when he had full, complete and accurate knowledge thereof, and also had knowledge of the fact that said defendant was expending many thousands of dollars in conducting said operations and developments, were and are such that said plaintiff should be and is estopped and barred from maintaining this action, and each and all of the claims and causes of action attempted to be set up and stated in his pleadings herein.

That said defendants further state and allege that heretofore, to wit, on the 8th day of May, 1925, this Court, in Civil Action No. 7237 herein, wherein Daniel Narcomey, Lizzie Sarty, Thomas W. Long, a minor, and Ned Sarty, his guardian, were plaintiffs, and Robert Keyes, J. P. Stewart, D. Replogle, T. B. Slick, Cosden Oil & Gas Company, Ida Bruner, and the unknown heirs, executors, administrators, devisees, trustees, and assigns, immediate and remote, of Lizzie Toney, deceased, and Salina Davis, deceased, were defendants, made, entered and rendered its final order, judgment and decree, a copy of which is hereto [fol. 159] attached, marked "Exhibit 2" and made a part hereof, and that said final order, judgment and decree has never been changed, modified or vacated, and that the same is in full force and effect; and that said defendants further state and allege that the aforesaid final order, judgment and decree was and is binding and conclusive upon the plaintiff, Noah Stewart, and that by virtue thereof the said Noah Stewart is foreclosed, barred, prevented and estopped from maintaining or attempting to assert or maintain any of the matters, things, actions or causes of action set out or attempted to be set out in his second amended petition herein, and that said defendants hereby refer to all of the files, records and proceedings in the aforesaid Civil Action No. 7237, and makes the same a part

hereof, with the same force and effect as if a true, correct and exact copy thereof was hereto attached.

(A full, true, correct and complete copy of said files, records and proceedings in said cause, being in words and figures as follows, to-wit:)

[fol. 160] That said answering defendants further state and allege that each and every cause of action attempted to be set up and stated in the pleadings of the above named plaintiff are and were at the time of the institution of this action barred by the Statutes of Limitation of the United States of America and of the State of Oklahoma.

That each and every claim of right, title, interest, equity and estate made and asserted by the above named plaintiff in and to the real estate and premises involved herein adverse to these answering defendants, and each of them, is absolutely null and void, and that the same constitute clouds upon the title or titles of said defendants, and of [fols. 161-211] each of them, and should be vacated, cancelled, set aside and held for naught, and that said title or titles should be quieted.

Wherefore, these answering defendants pray that it be adjudged and decreed that the above mentioned and described oil and gas mining lease is a good, valid and subsisting oil and gas mining lease and is in full force and effect, and that said defendant, Mid-Continent Petroleum Corporation, is the absolute owner and holder thereof, and that its possession of the real estate and premises covered by said lease and the possession of those under whom it claims has at all times been lawful, and that the said defendant, Mid-Continent Petroleum Corporation, is entitled to the possession of said real estate and premises under and by virtue of said lease and for the purposes thereof, and that it be further adjudged and decreed that every claim of right, title, interest, equity and estate made or asserted by the above named plaintiff adverse to these answering defendants, and each of them, is absolutely null and void, and that the same constitute clouds upon the title or titles of said defendants, and of each of them, and removing the same as such clouds and quieting the said titles of said defendants, and of each of them, and said answering defendants further pray that no judgment whatever be entered herein adverse to them, and that they have

and recover judgment for the costs of this action, and such other and further relief as is just and equitable.

J. C. Denton, J. L. Lockewitz, R. H. Wills, J. H. Crocker, H. N. Gray, P. J. Roberts, Attorneys for Defendants; Mid-Cont. Petroleum Corporation and Cosden Oil & Gas Company.

[fols. 212-215] In District Court of Seminole County, State of Oklahoma

Number 11,559

Noah Stewart, an Incompetent, by His Legal Guardian, R. L. Ream, Plaintiff,

vs.

Robert Keyes, T. B. Slick, D. Replogle, William G. Johnston, Leslie Rogers, Cosden Oil & Gas Company, a Corporation; Mid-Continent Petroleum Corporation, a Corporation; National Bank of Commerce of New York City, a Corporation; Phillips Petroleum Company, a Corporation; Echolustee Oil Corporation, a Corporation; Cosden & Company, a Corporation, Defendants.

Statement of Evidence

Tried in the District Court of Seminole County, State of Oklahoma, on the 5th day of March, 1930, before Honorable Lucius Babcock, duly assigned District Judge.

[fol. 216] Stipulation as to Certain Facts

Mr. Huser: It is hereby stipulated and agreed by and between the parties hereto that the land involved in this suit, described as the Southwest Quarter of Section 4, Township 10 North, Range 8 East, in Seminole County, Oklahoma, was allotted and patented to the heirs of Lizzie Toney, a full blood Creek Indian citizen, roll number 8540, and that the certificate of the selection of the allotment was issued January 13, 1902, vesting title to said land to the heirs of the said Lizzie Toney and that patents thereto

were duly and legally issued to said heirs. It is further stipulated and agreed by and between the parties hereto that the said Lizzie Toney, the allottee of the land above described, departed this life in the month of October, 1899, [fols. 217-320] intestate as to said estate, without children her surviving and unmarried. It is further stipulated and agreed by and between the parties hereto that the said Lizzie Toney in her life-time had born unto her four children, namely: Barney Toney, a son; Jimmie Toney, a son; Lucy Toney, known as and called Lucy Kernell, a daughter; and Canugy Toney. That all of said children named, died before the said Lizzie Toney. That Jimmie and Canugy left no issue. That Barney Toney left a son, a Creek Indian citizen Roll No. 4478 and a full-blood Creek Indian. That Lucy Kernell left two children, Ida Kernell, now Ida Bruner, and Selina Davis. That Selina Davis died and left her father Sam B. Davis, who is her sole heir at law. That the above named persons are the sole and only heirs at law of the said Lizzie Toney, deceased.

Mr. Rogers: It is further stipulated and agreed that the descent of Lizzie Toney, the allottee, was cast under the Creek law, the issuance of the certificate of the selection as the date that cast the descent.

(Here follows Exhibit 27, side folios 321-324)

Family No. 148 Wewoka District. CARD No. 2577

Creek No.	Creek No. 1895 Payroll	Township	Heads of Family	Members of Family	Relationship	Age.	Sex.	Degree of Blood	Post Office.	District.	Remarks.
			Stewart, Robert W			34	M	3/4	Holdenville	Wewoka	Little River Tulsa Roll
	100			Lucy	W	33	F	Full	"	"	Tukabatchee Roll
				Nathaniel W.	S	6	M	7/8	"	"	Little River Tulsa
				Antoinette, C	D	3	F	7/8	Simpson, Fisk	"	
				Noah	S	12	M	Full	"	"	Transferred to New
Robt W.	Lucy	nee	Noah Stewart	Simpson		19	M	3/8	"	"	Creek Card No 1784

Transferred to New Creek Card No 1408

Noah Stewart (adopted son of Robt W. Stewart) Mechanic & Farmer Coweta, son of Barney Coney and Lizzie Chupko, Full Creeks. Transferred to New Tenderloin Creek Card No 1312

Simpson Fisk, son of Walter Buck (deceased) and Sarah Buck, nee Stewart, now Sarah Panoosky. Card & roll No. 260. Half brother of Daniel Narcomey Card & roll No. 260.

Lucy on 1895 Payroll as Lucy Scott.

Robert W. Stewart, son of Robert W. Stewart (dead) adopted White and of Sophie Stewart, nee McQueen (dead) Full Creek, Little River Tulsa roll.

Lucy Stewart, daughter of Rocus Yahola (or Jones Scott (dead)) Full Creek, Tukabatchee Roll. and of Lilka Hott, full Creek on Tukabatchee roll. See Card No. 260 Wewoka

Nathaniel and Antonette, children of Robt W. Stewart by his first wife, Mary Stewart, nee Allen (dead) full Creek Tukabatchee roll.

RESIDENCE: _____

POST-OFFICE: Goldenrolls, Ind. Ter.

Creek Nation. Indian Roll.

CARD NO. 1404

FIELD NO. 1408

Dawes' Roll No.	Name	Relationship to Person first Named.	Age	Sex	Blood	Tribal Enrollment: Town	Tribal Enrollment: Page	Tribal Enrollment of Parents: Name of Father	Father: Year	Father: Town	Name of Mother	Mother: Year	Mother: Town
HH78	Stewart, Robert H.		22	M.	1/2	Little Tulsa	141	Robert H. Stewart	Dead	Wash. D.C.	Sophia McQueen	Dead	Little Tulsa
HH76	2 " Lucy	Wife	27	F.	Full	Tuckabatchee	228	Jesse Yahola	"	Tuckabatchee	Lotta Scott	1890	Tuckabatchee
HH77	3 Narcomey, Daniel	Nephew	9	M.	"	1898 Little Tulsa		Geo. Narcomey	"	Eufaula	Lizzie Chupco	Dead	Little Tulsa
HH71	4 Stewart, Noah	"	7	"	"	1898 " "		Barney Doney	"	Little Tulsa	" "	"	" "
HH99	5 Brunner, Charley	"	3	"	"	" "		Wm. Brunner	1890	Eufaula	Leah Reed	"	" "
	6												
	7												
	8					No 1 died prior to 12-1901. Name attached per Act of 3-3-1901. Transferred to Dur. Roll							
	9					No 1 on 1890 Roll as a Freedman							
	10					No 2 1890 Doney Dead							
	11					No 2 Little Lucy Doney on Census Roll of June 6th 1895							
	12					No 4					6th 1895	Dead	
	13 Ollie D. [illegible]					No 1					6th 1895		
	14 Entered Fairlee 1, 2, 3, 4th 5					No 2 Tuckabatchee Pay Roll of 1895							
	15 January 28th 1900												
322	16												
	17										Date of Application for Enrollment January 23, 1900		
	18												

ENROLLMENT OF THOSE WHOSE NAMES ARE MARKED ABOVE APPROVED BY THE SECRETARY OF INTERIOR March 13, 1902.

Blank 731.

Creek Roll, Indians By Blood.

No.	Name	Age	Sex	Blood	Card No.
4479	Stewart, Noah	7	M	Full	1404

DEPARTMENT OF THE INTERIOR
United States Indian Service
Five Civilized Tribes
Muskogee, Oklahoma.

This is to certify that I am the officer having the custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes of Indians, and the disposition of the land of said tribes, and the following described papers, attached hereto, are true and correct copies of the entire enrollment record on file in this office in connection with the application of

Noah Stewart

Roll No. 4478, for enrollment as Citizen of the Creek Nation:

Census Card #1404, Old Card #2577 and a Copy of Approved Roll No. 4478.

January 26, 1939.

Acting Dist. Supt. in Charge.

324=498

[fols. 499-501] In District Court of Seminole County, State of Oklahoma

No. 11,559

[Title omitted]

Further Proceedings

And now, on this 7th day of March, 1930, the same being a regular judicial day of the regular February Term 1930 of the above entitled court, this cause coming on further to be heard and all parties present as before and the court being in session, thereupon the following proceedings were had, to-wit:

Stipulation as to Restrictions on Allotments

Mr. Huser: It is hereby stipulated and agreed by and between the parties hereto, that the restrictions on the allottment of Lizzie Toney have never been removed by the Secretary of the Interior as provided for by Acts of Congress as relative to said action, and that the restrictions on the allotment of Noah Stewart had never been removed as provided for.

Mr. Wills: I want to add this, too, that the defendant insists that that is wholly immaterial.

[fol. 502] In District Court of Seminole County, State of Oklahoma

No. 11,559

Noah Stewart, an Incompetent, by His Legal Guardian, R. L. Ream, Plaintiff

vs.

Robert Keyes et al., Defendants

Journal Entry of Judgment—Filed March 13, 1930

Heretofore, to wit, on the 5th day of March, 1930, same being a regular judicial day of the February, 1930, term of this court, the above entitled and numbered cause came

regularly on for trial; plaintiff appeared in person and by his attorney of record, and the defendants, and each of them, appeared by their respective attorneys of record; said plaintiff and said defendants announced ready for trial and waived a trial by jury and agreed to a trial to the Court; thereupon said cause proceeded, regularly to trial; and the trial of said cause having proceeded regularly from day to day, and now on this the 7th day of March, 1930, same being a regular judicial day of the February, 1930, term of this court, plaintiff concluded the introduction of his evidence and rested; whereupon the defendants, and each of them, demurred to the evidence of said plaintiff; and the Court having heard and considered said demurrer, and the argu- [fols. 503-513] ments of counsel thereupon, and being well and fully advised in the premises, is of the opinion that said demurrer should be sustained.

It is therefore, by the court ordered, adjudged and decreed that the aforesaid demurrer of the defendants, and each of them, to the evidence of the plaintiff be, and the same is hereby sustained; and

It is further ordered, adjudged and decreed that the petition, amended petition and supplement of said amended petition, and the second amended petition, all filed by plaintiff herein be, and the same are hereby dismissed with prejudice; and that the plaintiff take nothing herein, and that the defendants, Robert Keyes, T. B. D. Replogle, William G. Johnston, Leslie Rogers, Cosden Oil & Gas Company, a corporation, Mid-Continent Petroleum Corporation, a corporation, Cosden & Company, a corporation, National Bank of Commerce of New York City, a corporation, Phillips Petroleum Company, a corporation and Echolustee Oil Corporation, a corporation, and each of them be, and they are hereby permitted to go hence without day, and that said defendants do have and recover of and from the plaintiff their costs herein expended.

To each and all the above and foregoing order, judgment and decree the plaintiff objected and excepted, and his exceptions are allowed.

Lucius Babcock, Judge.

OK. Tom Huser, Atty. for Plaintiff.

[File endorsement omitted.]

[fols. 514-518] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 11, 1934

The said Noah Stewart, plaintiff in error, assigns the following errors in the proceedings of the Supreme Court of the State of Oklahoma:

1. The Supreme Court of the State of Oklahoma erred in that it held that plaintiff's action, which was brought on April 11th, 1928 was barred by the statute of limitations and in so holding it erroneously held against the validity of the provision of section two, chapter 115 of the Act of Congress approved April 12th, 1926 (44 Stat. 239) which gave Noah Stewart, the plaintiff in error, the right as a restricted Indian to have until April 12th, 1928 in which to bring his action free from any bar of the statute of limitations.

2. The Supreme Court of the State of Oklahoma erred in not rendering judgment for the plaintiff in error as prayed for by him.

Wherefore plaintiff in error prays that the judgment of the Supreme Court of the State of Oklahoma be reversed and for all proper relief.

William Neff, W. H. Ballard, Attorneys for Plaintiff in Error.

[fols. 519-522] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 11, 1934

The petition of Noah Stewart for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of the State of Oklahoma and the assign-

ment of errors filed therewith and the record of said cause having been considered, it is

Ordered that an appeal be and is allowed to the Supreme Court of the United States from the Supreme Court of the State of Oklahoma, as prayed in said petition, and that the clerk of the Supreme Court of the State of Oklahoma shall prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States within thirty days from the date hereof.

It is further ordered that said appellant shall give a good and sufficient cost bond in the sum of $500.00 and appellant now presenting a sufficient bond in proper form in the sum of $500.00, it is

Ordered that the same be, and is hereby approved.

Dated June 11th, 1934.

Fletcher Riley, Chief Justice of the Supreme Court of Oklahoma.

[fol. 523] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 524] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY—Filed July 2, 1934

The appellant pursuant to Rule 13, paragraph 9 states that upon the appeal he intends to rely upon the following points to obtain a reversal of the final judgment of the Supreme Court of the State of Oklahoma:

1. Appellant is a restricted Indian and is the heir of a restricted Indian and his action was brought to recover his restricted land.

2. Prior to April 12th, 1928, there was no statute of limitations in force in Oklahoma which applied to appellant's right of action, for the statutes of limitations of the State of Oklahoma did not apply to actions brought by restricted Indians to recover restricted land. Alienation of the title of a restricted Creek Indian to his restricted land can be had only as authorized by some Act of Congress.

3. Appellant was given until April 12th, 1928, in which to bring his action by section 2 of chapter 115 of the Act of Congress of April 12th, 1926, and the said Act was valid.

4. Appellant's action was not barred by the statute of limitations.

William Neff, Counsel for Appellant.

Service of the above is acknowledged this 27th day of June, 1934.

James C. Denton, Richard H. Wills, Counsel for Appellees.

[fol. 525] In Supreme Court of the United States

Stipulation With Reference to the Portions of the Record to be Printed—Filed July 2, 1934

Appellant and appellees, pursuant to Rule 13, paragraph 9 of the Rules of the United States Supreme Court, hereby stipulate that, while there were presented to the Supreme Court of the State of Oklahoma several questions, the final judgment of said Court from which this appeal has been taken disposed of the case upon only one of the questions presented, to-wit: That appellant's attack upon the guardian's deed involved was barred by the Statutes of Limitation of the State of Oklahoma, and therefore, in order to present to the Supreme Court of the United States the sole question which was disposed of by the Supreme Court of the State of Oklahoma, it will only be necessary to print the following portions of the record, to-wit:

1. The opinion of the Supreme Court of the State of Oklahoma (R. 1-6);

2. The date of overruling appellant's petition for a rehearing by the Supreme Court of the State of Oklahoma (R. 10);

3. The date of the allowance of this appeal (R. 519);

4. The stipulation which was entered into between the appellant and the appellees during the trial in the Trial [fol. 526] Court when the first witness, Mr. Albert Stewart, was on the witness stand, which said stipulation commences with these words: "Mr. Huser: It is hereby stipulated and agreed by and between the parties hereto that the land in-

volved in this suit", etc., and ends with the words: "Mr. Rogers: It is further stipulated and agreed that the descent of Lizzie Toney, the allottee, was cast under the Creek law, the issuance of the certificate of selection as the date that cast the descent" (R. 216-217);

5. Appellant's Exhibit No. 27, introduced in evidence upon the trial in the Trial Court, which is a certified copy of the enrollment record in connection with the application of Noah Stewart for enrollment as a citizen of the Creek Nation (R. 321-324);

6. The stipulation which was entered into between the appellant and the appellees during the trial in the Trial Court on the 7th day of March, 1930, and shortly prior to the conclusion of appellant's evidence, which stipulation commences with these words: "Mr. Huser: It is hereby stipulated and agreed", and ends with the words: "Mr. Wills: I want to add this, too, that the defendant insists that that is wholly immaterial" (R. 499);

7. Separate answer and cross petition of the appellees, Mid-Continent Petroleum Corporation and Cosden Oil & Gas Company, to the appellant's second amended petition, omitting the exhibits attached thereto (R. 144-161);

8. Appellant's assignments of error in the United States Supreme Court (R. 514);

9. Appellant's statement as to jurisdiction of the United States Supreme Court (R. 516-518);

10. Appellees' motion to dismiss appeal (R. 523-524);
[fol. 527] 11. Appellees' statement in support of motion to dismiss for lack of jurisdiction (R. 525-529);

12. Appellant's statement of points;

13. This stipulation.

It is further stipulated that only the foregoing parts of the record should be printed.

Dated this 29th day of June, 1934.

William Neff, Attorneys for Appellant. T. H. Wren, Attorney for Appellee, Robert Keyes. W. W. Stokes, Attorneys for Appellee, T. B. Slick. A. M. Beets, Attorneys for Appellees, D. Replogle, William G. Johnston and Echolustee Oil Corporation. John Rogers, Attorney for Appellee, Leslie Rogers. James C. Denton, Richard H. Wills, J. H. [fols. 528 & 529] Crocker, I. L. Lockewitz, J. P.

Greve, Attorneys for Appellees, Mid-Continent Petroleum Corporation, Cosden Oil & Gas Company, Cosden & Company, National Bank of Commerce of New York City, and Phillips Petroleum Company.

[fol. 530] [File endorsement omitted]

Endorsed on cover: File No. 38,770. Oklahoma Supreme Court. Term No. 142. Noah Stewart, appellant, vs. Robert Keyes, T. B. Slick, D. Replogle, et al. Filed July 2, 1934. File No. 142, O. T., 1934.

(5560-C)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 142

NOAH STEWART,

Appellant,

vs.

ROBERT KEYES ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

STATEMENT, PURSUANT TO RULE 12, AS TO JURISDICTION OF THE UNITED STATES SUPREME COURT UPON APPEAL IN THIS CAUSE.

Pursuant to Supreme Court Rule 12, Noah Stewart, the above appellant, files this, his statement, disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment appealed from herein, as follows:

a. The statutory provisions believed to sustain the jurisdiction are sections 861a and 344 of Title 28 of the United States Code in that the Supreme Court of Oklahoma decided against the validity of a statute of the United States.

b. The statute of the United States the validity of which is involved is section 2, chapter 115 of the Act of Congress of April 12, 1926, 44 Stat. 239, which reads as follows:

> "Sec. 2. The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians, and against all rights and causes of action heretofore accrued or hereafter accruing to any such Indians or their heirs or grantees, to the same extent and effect and in the same manner as in the case of any other citizen of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any such Indian, his heirs or grantees, either in his own behalf or by the Government of the United States, or by any other party for his or her benefit, to the same extent as though such action were brought by or on behalf of any other citizen of said state: Provided, That no cause of action which heretofore shall have accrued to any such Indian shall be barred prior to the expiration of a period of two years from and after the approval of this Act, even though the full statutory period of limitation shall already have run or shall expire during said two years' period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years' period free from any bar of the statutes of limitations."

c. The date of the judgment sought to be reviewed is March 27, 1934, at which time the judgment of the Supreme Court of Oklahoma became final by reason of the overruling of the petition for rehearing. The opinion so made final was filed February 20, 1934. The date upon which the application for appeal is presented is the 11th day of June, 1934. The appeal is from the final judgment of the highest court of the State of Oklahoma.

The record in this case shows that 160 acres of land were allotted to Lizzie Toney, a restricted full-blood Creek Indian, and patents were issued to her heirs. The plaintiff, Noah Stewart, took a one-half interest in said allotment. He was an enrolled, full-blood restricted Indian. On July 1, 1916, one John A. Jacobs acting as purported guardian of Noah Stewart, who was then of full age, purported to sell his half interest in said land for the sum of $600.00. On April 11, 1928, plaintiff filed in the District Court of Seminole County, Oklahoma, a suit to recover his interest in the allotment, contending the guardian's deed was wholly void. The trial court rendered judgment against him and he appealed. The defendants relied upon the statute of limitations as a complete defense to the action. That defense was sustained by the Supreme Court of the State of Oklahoma. Plaintiff contended that he was affirmatively granted the right to bring his action free from any bar of the statute of limitations by the said statute of the United States and especially by the proviso thereof:

> "Provided, That no cause of action which heretofore shall have accrued to any such Indian shall be barred prior to the expiration of a period of two years from and after the approval of this Act, *even though the full statutory period of limitation shall already have run* or shall expire during said two years' period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years' period free from any bar of the statutes of limitations."

Ignoring its prior decision in 1925 in *Lytle* v. *Fulotka*, 105 Okla. 86, 233 Pac. 456, that the Oklahoma statute of limitations had no application where a restricted Indian brought a suit to recover land sold at a void guardian's sale at a time when he was an adult, the Oklahoma Supreme

Court held that in this case the bar of the statute of limitations had become complete prior to the date of the passage of said Act of Congress, that to allow said statute to remove the bar of the statute of limitations would be to deprive the defendants of their title to the land in controversy without due process of law. It quoted approvingly as the basis for its decision the following:

> "It may, therefore, very well be held that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff, would be to deprive him of his property without due process of law."

The opinion of the Oklahoma Supreme Court plainly holds that the portion of the statute of the United States, which gives every restricted Indian two years after the approval of the Act in which to bring any suit which theretofore shall have accrued to such Indian,

> "even though the full statutory period of limitation shall already have run"

is invalid because the effect of this portion of the statute, if enforced, would be to take property without due process of law.

The effect of the decision of the Oklahoma Supreme Court was to hold said statute of the United States invalid so far as the right of the plaintiff was concerned. *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239, and *Bunch* v. *Cole*, 263 U. S. 250, 68 L. Ed.

290, hold that for purposes of review by writ of error a State court holds a State statute valid whenever it enforces the statute. Conversely it must be deemed to hold a statute of the United States invalid when it refuses to give force to the statute, especially when such refusal is accompanied by a statement that to give effect to the plain language of the statute would be to deprive defendants of their property without due process of law.

That the statute by its plain terms, if valid, gave appellant the right to bring his action

"free from any bar of the statutes of limitations"

is not open to controversy. The only ground on which the right asserted by the appellant could in good faith be denied would be that the statute is invalid. The opinion of the Oklahoma Supreme Court, by necessary implication, says that the statute is invalid.

Further, its holding for purposes of review must be deemed based upon the only ground which the Oklahoma Supreme Court could reasonably have acted, if that court acted in good faith, which is that the statute is invalid.

Respectfully submitted,

WILLIAM NEFF,
Counsel for Appellant.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1933.

No. 142

NOAH STEWART, *Appellant,*

vs.

ROBERT KEYES, *ET AL., Appellees.*

BRIEF OPPOSING MOTION TO DISMISS APPEAL AND SHOWING GROUNDS FOR WRIT OF *CERTIORARI* IF MOTION GRANTED.

Summary of Brief.

Appellant inherited a one-half interest in the allotment of Lizzie Toney. He is a full-blood restricted Creek Indian. On July 1st, 1916, at which time he was of full age, a purported guardian sold his interest in said land. The guardianship was void and the sale was void.

By Act of April 12th, 1926, to be effective April 12th, 1928, Congress made the Oklahoma statutes of limitations applicable to actions brought by restricted Indians of the Five Civilized Tribes but gave all such Indians the right up to April 12th, 1928, to sue

"free from any bar of the statutes of limitations."

Until long after the passage of the act the uniform holding of the Oklahoma Supreme Court had been that the statutes of limitations of Oklahoma operated to transfer title to land, that the title to lands inherited by full-blood Indians of the Five Civilized Tribes could be alienated only as provided by Acts of Congress and that therefore, actions by such full-blood Indians to recover inherited land could not be barred by the statutes of limitations.

On April 11th, 1928, appellant brought suit to recover his interest in said land. The Oklahoma Supreme Court rendered judgment against him because, as it held, his action was barred by the statute of limitations.

The opinion of that court is quoted and quotations are made from the authorities cited in the opinion to show that the opinion by express words and in substance and effect and by necessary implication held the Act of Congress unconstitutional and void.

Argument is made that jurisdiction on the appeal should be sustained because the decision held against the validity of a statute of the United States. It is contended that the decision by express words and in substance and effect and by necessary implication held against the validity of such statute. Authorities are cited to show that it is not necessary that the decision against the validity be in express words but that jurisdiction to review exists if the decision in substance and effect or by necessary implication denies the validity of the statute.

Argument is further made that jurisdiction on the appeal should be sustained because the Oklahoma Supreme Court applied the state statute of limitations as against

the contention of appellant, made in that court, that the state statutes could not be applied because in conflict with the statutes of the United States. It is conceded that this legal contention was not made in the statement as to jurisdiction. But the general facts showing that this ground of jurisdiction existed are stated in the statement as to jurisdiction. This court has jurisdiction on appeal if the ruling of the state court was such as to give it jurisdiction and the purpose of the statement as to jurisdiction is to show what that ruling was. Since this court has held that the assignment of errors which is required both by statute and rule of court is not jurisdictional it would seem to follow that the statement as to jurisdiction which is required only by rule of court is not jurisdictional and that the failure to comply in all particulars with Rule 12 in setting up this ground of jurisdiction will not defeat the jurisdiction of the court.

In case this court should sustain the motion to dismiss the appeal, a writ of *certiorari* should be granted, for the state court has decided a federal question of substance in a way not in accord with the applicable decisions of this court and has decided against the long recognized paramount right of Congress to legislate concerning the inherited property of full-blood Indians. There are many pending cases which will be effected by the decision in this case. The highest court of the United States should maintain the supremacy of the laws of the United States made to protect full-blood Indians who are wards of the United States. The decision of the state court is in the highest degree unjust to dependent Indians in that the state court, while the statute of limitations was running, if applicable, held on grounds of federal law that the statute of limita-

tions was not applicable to actions by full-blood Indians to recover their inherited lands and then after statute, if applicable, had fully run changed its decision to hold the statute applicable to such actions.

Statement of the Case.

This is an appeal from a judgment of the Supreme Court of Oklahoma which became final on March 27th, 1934. The appeal was allowed on June 11th, 1934.

The opinion of that court is reported in 30 P. (2d) 75, and in LXIX Oklahoma Appellate Court Reporter 249. It will later be reported in the Oklahoma reports.

Appellees have filed a motion to dismiss for want of jurisdiction to review by appeal. They do not contend that a federal question is not presented by the appeal.

The facts shown by the jurisdictional statements of appellant and appellees are that, 160 acres of land were allotted to Lizzie Toney, a restricted full-blood Creek Indian, and patents were issued to her heirs. The appellant was one of her heirs and took a half interest in the allotment. He was an enrolled, full-blood restricted Creek Indian. On July 1st, 1916, one John A. Jacobs, acting as purported guardian of appellant, who was then of full age, purported to sell his half interest in the land. On April 11th, 1928, appellant brought suit to recover his interest in the allotment contending the guardian's deed was wholly void. The trial court rendered judgment against him and he appealed. The Supreme Court of the State of Oklahoma held that his action was barred by the statute of limitations and for that reason affirmed the judgment.

Appellant relied upon section 2 of chapter 115 of the Act of Congress of April 12th, 1926, 44 Stat. 239.

The material part of said Act of Congress is as follows:

> "The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians * * *; *Provided*, that no cause of action which heretofore shall have accrued to any such Indian shall be barred prior to the expiration of a period of two years from and after the approval of this act, even though the full statutory period of limitations shall already have run or shall expire during said two years' period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years' period free from any bar of the statutes of limitations."

Like statutes have been held constitutional except where they apply to statutes of limitations which have the effect of vesting title to real property in the occupant thereof.

Until after the passage of said Act the uniform holding of the Oklahoma Supreme Court had been that the statutes of limitations of Oklahoma operated to transfer title to land, that the title to lands inherited by full-blood Indians of the Five Civilized Tribes could be alienated only as provided by Acts of Congress and that therefore, actions by such full-blood Indians to recover inherited land could not be barred by the statutes of limitations. *Lytle* v. *Fulotka*, 106 Okl. 86, and other cases cited under III.

The Oklahoma Supreme Court by fair inference held that in this case the title to the property had been vested in

the occupants and the Act of Congress was therefore unconstitutional and void.

The opinion of that court said:

> "The plaintiff's original petition was filed on April 11th, 1928. The cause of action attempted to be stated therein was based on the allegations that the appointment of John A. Jacobs as guardian for him was invalid; that the continuation of such guardianship after the plaintiff had reached the age of majority was invalid and that the sale of the land in question by the guardian was invalid. Thereafter various amendments were filed.
>
> "Since the controlling issue is whether or not that guardian's deed can be attacked herein, the details of the allegations of the petition and amendments are not stated."

The opinion states that the guardian's deed was filed for record on the 12th day of July, 1916, and that the guardian was discharged on August 4th, 1917, and discusses sections 1444 and 99, Oklahoma Statutes, 1931, limiting the time for bringing suit to three years after the termination of the guardianship and to five years after the recording of the guardian's deed. The opinion then holds that the action is barred by the Oklahoma statutes of limitations and denies the contention of appellant that these statutes could not apply because repugnant to section 2 of chapter 115 of the Act of Congress of April 12, 1926, 44 Stat. 239, and denies the contention of appellant that he was given by that act the right to bring, up to April 12th, 1928, his action free from any bar of the statutes of limitations. The opinion by reasonable implication holds said Act of Congress invalid.

The holding of the court in full showing the reasoning on which its conclusion was based is as follows:

"The action was not commenced until the 11th day of April, 1928. The plaintiff contends that this action was brought under the provisions of section 2, chapter 115 of the Act of Congress of April 12, 1926 (44 Stat. 239), generally known as the Hastings-Harreld Act; that it was brought within the two-year period provided by that act, and that the restrictions provided in section 1444, O. S. 1931, as to attacks on guardians' sales do not apply. With that contention we cannot agree.

"In *Campbell* v. *Holt*, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. 209, the Supreme Court of the United States said:

> 'It may, therefore, very well be held that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff, would be to deprive him of his property without due process of law.'

"The Hastings-Harreld Act, *supra*, did not and could not affect causes of action that had been barred by the statutes of limitation prior to the enactment thereof. See 17 R. C. L., sec. 16, p. 674; 34 Corpus Juris, sec. 14, p. 697.

"The right of the plaintiff to have the guardian's deed in question cancelled was barred by the applicable statutes of limitation prior to the commencement of this action, even though, as contended by the plaintiff, that deed was void."

The opinion also cites the case of *Stolfa* v. *Gaines,* 140 Okl. 292, 283 Pac. 563, which holds that under the Oklahoma law occupancy under a void guardian's deed for the period which bar an action to recover the land vests title to the land in the occupant, such title being "denominated a title by prescription."

Page 674 of 17 Ruling Case Law, section 16, on limitations, cited to sustain the holding of the opinion, reads as follows:

> "There appears to be no divergence of opinion as to the full applicability of the principle that the legislature cannot divest a vested right to a defense under the statute of limitations, whether the case involves the title to real estate or personal property...Where a right of action to recover property is barred in favor of one having possession thereof the possessor becomes the owner of the property, with all the incidents of ownership, and his title cannot be impaired by subsequent legislation."

The text cites as sustaining the last portion thereof the following cases:

> *Campbell* v. *Holt,* 115 U. S. 620, 29 L. ed. 483;
> *Moore* v. *State,* 43 N. J. Law, 203, 39 Am. Rep. 558;
> *McEldowney* v. *Wyatt,* 44 W. Va. 711, 30 S. E. 239, 45 L. R. A. 609.

The first cited case is quoted from in the opinion. The second cited case holds that an act removing the bar of the statute of limitations which had already run in a criminal case was "unconstitutional and void." The third cited case, *McEldowney* v. *Wyatt,* holds:

> "Where title to property has vested under the statute of limitations no act can, by extending the stat-

ute or reviving the remedy, impair such title. It would be unconstitutional because depriving one of property without due process of law."

Taking into consideration the cases cited as authorities to sustain its holding, the opinion in this case, by fair inference holds that the statutes of limitations of the State of Oklahoma had prior to April 12th, 1926, vested the title to the allotment in controvery in the occupants thereof who had acquired a title by prescription and for that reason the Act of Congress, which gave the appellant the right to sue to recover the land

"free from any bar of the statutes of limitations"

was "unconstitutional and void" because having the effect of depriving the occupants of the land of their title by prescription, without due process of law.

The opinion in substance and effect denies the validity of an Act of Congress. This court has jurisdiction on appeal because the decision of the Oklahoma Supreme Court was against the validity of a statute of the United States.

The ruling of the Oklahoma Supreme Court complained of presents a further ground of jurisdiction for review by this court on appeal in that the state court applied a state statute to bar appellant's action and denied his contention that the statute so applied was repugnant to the laws of the United States.

Appellant's assignment of errors are as follows:

1. The Supreme Court of the State of Oklahoma erred in that it held that plaintiff's action, which was brought on April 11th, 1928, was barred by the statute of limitations

and in so holding it erroneously held against the validity of the provision of section two, chapter 115 of the Act of Congress approved April 12th, 1926 (44 Stat. 239), which gave Noah Stewart, the plaintiff in error, the right as a restricted Indian to have until April 12th, 1928, in which to bring his action free from any bar of the statute of limitations.

2. The Supreme Court of the State of Oklahoma erred in not rendering judgment for the plaintiff in error as prayed for by him.

Appellant's statement of points contains the following:

The appellant, pursuant to Rule 13, paragraph 9, states that upon the appeal he intends to rely upon the following points to obtain a reversal of the final judgment of the Supreme Court of the State of Oklahoma:

1. Appellant is a restricted Indian and is the heir of a restricted Indian and his action was brought to recover his restricted land.

2. Prior to April 12th, 1928, there was no statute of limitations in force in Oklahoma which applied to appellant's right of action, for the statutes of limitations of the State of Oklahoma did not apply to actions brought by restricted Indians to recover restricted land. Alienation of the title of a restricted Creek Indian to his restricted land can be had only as authorized by some Act of Congress.

3. Appellant was given until April 12th, 1928, in which to bring his action by section 2 of chapter 115 of the Act of Congress of April 12th, 1926, and the said act was valid.

4. Appellant's action was not barred by the statute of limitations.

ARGUMENT.

I.

Jurisdiction on appeal should be sustained because the judgment of the Supreme Court of Oklahoma in holding that appellant's action was barred by the Oklahoma statutes of limitations held against the validity of a statute of the United States, which gave appellant the right to bring the action "free from any bar of the statutes of limitations." While appellant contends that the Supreme Court of Oklahoma denied the validity of the statute by express words, it is sufficient to confer jurisdiction to review that in substance and effect or by necessary implication it denied the validity of the statute.

—*New York, ex rel. Bryant,* v. *Zimmerman,* 278 U. S. 63 at 67, 73 L. ed. 184 at 187;

St. Louis I. M. & S. R. Co. v. *Starbird,* 243 U. S. 592, at 601, 61 L. ed. 917 at 924;

Lawrence v. *State Tax Commission,* 286 U. S. 276, 76 L. ed. 1102;.

Ward v. *Love County,* 253 U. S. 17 at 22-23, 64 L. ed. 751 at 758;

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. *Michaux,* 279 U. S. 737, 73 L. ed. 931;

Bunch v. *Cole,* 263 U. S. 250 at 252, 68 L. ed. 290 at 292.

Taking into consideration the language of the opinion, which is quoted in the statement of the case, and the authorities cited in the opinion to sustain its holding that appellant's action was barred by the statutes of limitations, it

is clear that the holding is based upon the following propositions:

1. Where the statute of limitations has fully run and its effect is to vest title to land in the occupant thereof, a statute which attempts to remove the bar of the statute of limitations is unconstitutional and void as taking property without due process of law.

2. The effect of the Oklahoma statutes of limitation is to vest a title by prescription in the occupant of land who has occupied adversely for the statutory period.

3. Defendants in this case have occupied adversely for the statutory period.

4. The Act of Congress which purports to give appellant the right to sue from any bar of the statutes of limitations is, therefore, unconstitutional and void.

After citing authorities to the effect that in certain cases statutes removing the bar of the statute of limitations are unconsitutional and void it says:

> "The Hastings-Harreld Act, *supra,* did not and *could not* affect causes of action that had been barred by the statutes of limitations prior to the enactment thereof. See 17, R. C. L., Sec. 16, p. 674; 34 Corpus Juris, Sec. 14, p. 697.
>
> "The right of the plaintiff to have the guardian's deed in question cancelled was barred by the applicable statutes of limitations prior to the commencement of this action, even though, as contended by the plaintiff, that deed was void."

Is it not clear that the necessary meaning of the words when taken in connection with the authorities cited is that the Act of Congress is invalid?

Appellees contend in effect that the opinion does not say in express words that the act is invalid. This court in *New York, ex rel. Bryant,* v. *Zimmerman,* 278 U. S. 63 at 67, 73 L. ed. 184 at 187, said:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> "Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

In *St. Louis I. M. & S. R. Co.* v. *Starbird,* 243 U, S. 592 at 601, 61 L. ed. 917 at 924, it is said:

> "It has never been required that a federal right must be denied in terms, but it has been uniformly held that it is sufficient if the state court necessarily denied it in the judgment rendered."

The following cases sustain the general proposition that in order to give this court jurisdiction to review the judgment of a state court it need not appear by express statement in the opinion of the state court that its holding is such as to give this court a right of review but that it is sufficient if a right based on a federal ground was denied in substance and effect and that it is the substance and

effect of the holding rather than the language used which determines whether there is a right to review by this court:

Lawrence v. *State Tax Commission*, 286 U. S. 276, 76 L. ed. 1102;

Ward v. *Love County*, 253 U. S. 17 at 22-23, 64 L. ed. 751 at 758;

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. *Michaux*, 279 U. S. 737, 73 L. ed. 931.

As stated in *Ward* v. *Love County*, *supra*, the purpose of review by this court of decisions of state court is

"to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof."

Therefore this court should hold that the provision allowing a review by appeal where the validity of an Act of Congress is involved is at least as broad in its scope as the provision allowing a review by appeal where the validity of a state statute is involved. In the latter case a review by appeal can be had if the state court gives force and effect to the state statute when a claim is made that as applied it is in conflict with a statute of the United States. *Bunch* v. *Cole*, 263 U. S. 250 at 252, 68 L. ed. 290 at 292. For to give force and effect to the state statute is in effect to hold the state statute valid.

Conversly to refuse to give force and effect to the statute is to hold it invalid, especially when the refusal to give effect to the statute is accompanied by argument, which could be directed only to show that the statute is unconstitutional and void. Certainly such an opinion does not concede the validity of the statute.

II.

Jurisdiction on appeal should be sustained because the Oklahoma Supreme Court applied the state statute of limitations as against the contention of appellant, made in that court, that the state statute could not be applied because in conflict with the laws of the United States. While it is conceded that jurisdiction on this ground was not specifically claimed in the statement as to jurisdiction, the general facts showing that this ground of jurisdiction exists are set forth in the statement as to jurisdiction. This court has jurisdiction on appeal if the ruling of the state court was such as to give it jurisdiction and the purpose of the statement as to jurisdiction is to show what that ruling was. Since this court has held that the assignment of errors which is required both by statute and rule of court is not jurisdictional it would seem to follow that the statement as to jurisdiction which is required only by rule of court is not jurisdictional and that the failure to comply with all the requirements of Rule 12 in asserting this ground of jurisdiction will not defeat the jurisdiction of the court on this ground.

—*Bunch* v. *Cole*, 263 U. S. 250, 68 L. ed. 290;

New York, ex rel. Bryant, v. *Zimmerman*, 278 U. S. 63, 73 L. ed. 184;

Independent School District of Ackley v. *Hall*, 106 U. S. (16 Otto) 428, 27 L. ed. 237;

Old Nick Williams Co. v. *United States*, 251 U. S. 541, at 544, 54 L. ed. 318, at 320;

Lamb v. *Cramer*, 285 U. S. 217, at 221-2, 76 L. ed. 715, at 720;

World's Columbian Exposition Co. v. *Republic of France*, 91 Fed. 64, at 69;

Green v. *United States*, 19 F. (2d) 850;

In re T. E. Hill Co., 148 Fed. 832.

The opinion of the Oklahoma Supreme Court says:

> "The plaintiff contends that this action was brought under the provisions of section 2, chapter 115 of the Act of Congress of April 12th, 1926 (44 Stat. 239), generally known as the Hastings-Harreld Act; that it was brought within the two-year period provided by that act, and that the restrictions provided in section 1444, O. S. 1931, as to attacks on guardian's sales do not apply. With that contention we do not agree."

The opinion then cites authorities which are obviously cited to show that the said Act of Congress is unconstitutional and void.

The record made shows that the Oklahoma Supreme Court applied the Oklahoma statute and denied the contention of appellant that the Oklahoma statute could not be applied because repugnant to the Act of Congress, which Act of Congress was by fair inference held unconstitional and void.

The record made presents a ground for review on appeal on the authority of:

> *Bunch* v. *Cole*, 263 U. S. 250, 68 L. ed. 290;
> *New York, ex rel. Bryant*, v. *Zimmerman*, 278 U. S. 63, 73 L. ed. 184.

However, since those cases were decided, the statutes relating to review of judgments of state courts have been changed to provide for appeal instead of writ of error and this court has amended its rules to provide for the filing of a statement disclosing the basis upon which it is contended that this court has jurisdiction upon appeal to review the judgment in question.

In this case the general error assigned is:

> "The Supreme Court of the State of Oklahoma erred in that it held that plaintiff's action, which was brought on April 11th, 1928, was barred by the statute of limitations * * *."

This assigns as error the ruling above quoted.

So we have a ruling which presents ground for review by appeal and a general assignment of error directed to the ruling but no specific claim, other than what may be inferred, that there was error in holding a state statute valid which was repugnant to the laws of the United States.

The statement as to jurisdiction specifically contends this court has jurisdiction because a statute of the United States was held invalid. It further states in effect that the Oklahoma Supreme Court had applied the Oklahoma statute of limitations contrary to a prior decision that the Oklahoma statute of limitations could not be applied under similar facts because repugnant to the laws of the United States. The statutes of limitations of the State of Oklahoma involved are summarized in the opinion of the Oklahoma Supreme Court. The statement as to jurisdiction does not make the specific claim that jurisdiction on appeal is based upon the fact, which is actually shown by the record, that the judgment complained of applied a state statute, which appellant contended could not be applied because repugnant to the laws of the United States. It can fairly be argued that the jurisdictional statement by fair inference shows that the nature of case and of the ruling of the court was such as to bring the case within the jurisdictional provision of the statute allowing review by appeal where a state statute is held valid against the contention that it is

repugnant to the laws of the United States. But it cannot fairly be contended that such ground of jurisdiction was relied on in the statement as to jurisdiction.

Appellant contends that whether this court has jurisdiction depends upon whether the rulings of the state court are such as to give this court jurisdiction under the statute and not upon whether the appellant in the statement as to jurisdiction specifically relies upon a particular ground of jurisdiction.

While the statute (section 862, U. S. Code) requires an assignment of errors, it has always been held that the assignment of errors

> "although required by the Act of Congress and the rule of court"

is not jurisdictional and an appeal will not be dismissed for lack of an assignment of errors.

—*Independent School District of Ackley* v. *Hall*, 16 Otto 428, 27 L. ed. 237;

Old Nick Williams Co. v. *United States*, 251 U. S. 541 at 544, 54 L. ed. 318 at 320;

Lamb v. *Cramer*, 285 U. S. 217, at 221-2, 76 L. ed. 715, at 720;

World's Columbian Exposition Co. v. *Republic of France*, 91 Fed. 64 at 69;

Green v. *United States*, 19 F. (2d) 850.

Likewise compliance with statutory requirements as to citation and bond have been held not to be jurisdictional.

—*In re T. E. Hill Co.*, 148 Fed. 832.

It would seem that if failure to file an assignment of errors required both by statute and rule of court would not defeat the jurisdiction, failure to allege in the statement

as to jurisdiction, which is required only by rule of court, that jurisdiction on the appeal exists on the ground here claimed would not defeat jurisdiction on that ground.

The purpose of the statement as to jurisdiction is to bring to the attention of this court the erroneous ruling of the state court which this court is asked to review by appeal.

In this case one ruling is complained of which is that the Supreme Court of Oklahoma adjudged that appellant's action was barred by the statutes of limitations of the State of Oklahoma. Such ruling should not have been made because the statute of the United States gave appellant the right to maintain his action free from any bar of the statutes of limitations, and the statutes of Oklahoma, which were applied to bar his action, were repugnant to the statutes of the United States. This ruling gave two interrelated grounds for this court, on appeal, to review the judgment. A specific claim of right to review on one ground is made in the statement as to jurisdiction. The general facts showing a right to review on the other related ground, that is that the state statutes applied to bar the action, are repugnant to the statutes of the United States, are mentioned in the statement as to jurisdiction although the right to review is not specifically based on this ground. The record discloses a right to review on both grounds.

Jurisdiction should be sustained on the second ground as well as first ground.

III.

In case this court should sustain the motion to dismiss the appeal then *certiorari* should be granted for in refusing to give effect to the plain language of an Act of Congress which gave appellant, who is a full-blood restricted Creek Indian, until April 12th, 1928, in which to sue "free from any bar of the statute of limitations," and in denying the authority of Congress to avoid the bar of a state statute of limitations against suits by restricted Indian wards of the United States, and in holding that his title to his inherited land had been alienated, prior to April 12th, 1926, by the statute of limitations, the state court held contrary to the applicable decisions of this court which hold that in all matters relating to full-blood Indian wards of the United States the Acts of Congress are supreme and which hold that the inherited lands of full-blood Indians can be alienated only by means provided by some Act of Congress. There are many pending cases in which the question here decided is involved. Titles will be effected by the decision. Full-blood Indians have always been regarded as wards of the United States. Therefore, when the state court refuses to give effect to an Act of Congress as the supreme law of the land, the highest court of the United States should protect the rights of the wards of the United States and maintain the supremacy of the laws of the United States made to protect full-blood Indians. Especially should review be had in this case as the state court held during the time the statute of limitations was running, if applicable, that such statute was not applicable to actions by full-blood Indians to recover their inherited lands because the application of such statute would be contrary to federal laws and then after the statute had fully run, if applicable, held that the stat-

ute was applicable and such change in decision as to the effect of federal laws is in the highest degree unjust to the dependent Indian wards of the United States, so that this court should determine which of the conflicting decisions of the Oklahoma court correctly decided the effect of the federal law.

The opinion of the Oklahoma Supreme Court has been analyzed in the preceding parts of this brief. It refuses to give effect to the plain terms of the statute of the United States which gave the appellant until April 12th, 1928, in which to sue

"free from any bar of the statutes of limitations."

Such refusal was on the ground that prior to the date of the passage of the act the appellees had acquired title to the property in controversy by the Oklahoma statute of limitations. But for such holding there could be no valid objection to the act for in all cases, except where title to property has passed by reason of a statute of limitations, the legislature may give further time in which to sue even though the time limited by the previous statute has fully run.

—*Campbell* v. *Holt*, 115 U. S. 620, 29 L. ed. 483;
Arcadia Mills v. *Carolina, C. & O. Ry.*, 293 Fed. 639, at 645;
Standley v. *United States Railroad Administration*, 271 Fed. 794;
United States v. *Chicago & E. I. Ry. Co.*, 298 Fed. 779.

If, as will be shown, the Oklahoma statute of limitations prior to April 12th, 1928, never applied to appellant's action, then the holding of the Oklahoma court that his ac-

tion was barred by the Oklahoma statute of limitation is erroneous, and its conclusion that the Act of Congress of April 12th, 1926, giving appellant until April 12th, 1928, in which to sue, could not be valid, as applied to appellant's action, is erroneous.

The Oklahoma court correctly held that the effect of the Oklahoma statute of limitations relating to the recovery of real property, where applicable, is to transfer the title to the property to the adverse occupant. *Stolfa* v. *Gaines*, 140 Okl. 292; *Toltec Rauch Co. v. Cook*, 191 U. S. 532, 48 L. ed. 291. In the last cited case this court said:

> "Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance."

In holding that the title to the inherited lands of the appellee, who is an adult full-blood Indian, could be alienated by the statutes of limitations prior to April 12th, 1928, the Oklahoma Supreme Court held contrary to all applicable decisions of this court and to many decisions of the Oklahoma Supreme Court.

It has been the uniform holding by this court that the alienation of lands formerly belonging to the Five Civilized Tribes in Oklahoma are not, unless Congress otherwise provides, subject to alienation by any state law of Oklahoma. Since appellees in their statement in support of their motion to dismiss have suggested that the rule is otherwise as to inherited lands and have stated that the lands in controversy are not restricted, the cases cited will be those which hold that the inherited land of a full-blood Indian are restricted.

After referring to the fact that the right to legislate concerning Indians was reserved to Congress by the Oklahoma Enabling Act, this court in *Sperry Oil & Gas Co.* v. *Chisholm*, 264 U. S. 488, at 493, 68 L. ed. 803, at 808, said:

> "Congress was thus careful to preserve to the United States the authority over the Indians, their lands and property, which it possessed prior to the passage of the Enabling Act; retaining full power, which it had exercised from the earliest period, to deal with them as dependent people, and legislate concerning their property with a view to their protection; with the right to determine when, in their interest, the government guardianship should cease, and plenary authority, notwithstanding the bestowal of federal citizenship upon them, to place restrictions upon their right of alienating the lands allotted to them. *Marchie Tiger* v. *Western Invest. Co.*, 221 U. S. 286, 309 • • •."

The term allotted lands is here used as inclusive of allotted lands which have been inherited by members of the Five Civilized Tribes. For *Marchie Tiger* v. *Western Investment Co., supra,* which is cited as authority, was a case concerning restrictions on conveyances by full-blood Indian heirs of allotted lands inherited by them and held such inherited lands to be restricted.

Parker v. *Richard*, 250 U. S. 235, 63 L. ed. 954, finally settled the question whether allotted lands after being inherited by full-blood members of the Five Civilized Tribes are still restricted by holding as follows:

> "1. *Lands inherited from a Creek allottee by a full-blood Indian heir were not freed from the restrictions on alienation* imposed by the Act of May 27, 1908 (35 Stat. at L. 312, Chap. 199), by the provision of #9 of that act, that the death of any allottee shall oper-

ate to remove all restrictions upon the alienation of the allottee's land, 'provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee,' since, as to this class of heirs, restrictions are not removed, but are merely relaxed or qualified to the extent of sanctioning such conveyances as receive the court's approval."

Other cases holding inherited lands to be restricted lands are:

Brader v. *James*, 246 U. S. 88, 62 L. ed. 591;
Talley v. *Burgess*, 246 U. S. 104, 62 L. ed. 600;
Kiker v. *United States*, 63 F. (2d) 957;
Conner v. *Cornell*, 32 F. (2d) 581, *certiorari* denied 280 U. S. 583.

This court in *Bunch* v. *Cole*, 263 U. S. 250, at 252, 68 L. ed. 290, at 292, said:

"The power of Congress to impose restrictions on the rights of Indian wards of the United States to alienate or lease lands allotted to them in the division of the lands of their tribe is beyond question; and, of course, it is not competent for a state to enact or give effect to a local statute which disregards these restrictions or thwarts their purpose. *Marchie Tiger* v. *Western Invest. Co.*, 221 U. S. 286, 316; * * * *Brader* v. *James*, 246 U. S. 88, 96; * * * *Mullen* v. *Pickens*, 250 U. S. 590, 595. * * *"

While this case concerns an original allotment, the three cases above cited to sustain the opinion concern deeds made by heirs. It is obvious that to permit inaction by a full-blood Indian to alienate his title would thwart the purpose of an act which allowed alienation only upon approval of a federal agency.

Attention at this time is called to some of the cases decided by the Oklahoma Supreme Court which held that prior to the passage of the act in controversy, the statute of limitations of Oklahoma could not be applied to bar an action by a full-blood Indian heir to recover his inherited land for the reason title to his inherited land could not be alienated except as provided by Act of Congress.

In *Lytle* v. *Fulotka*, 106 Okl. 86, 233 Pac. 456, the opinion states:

> "Plaintiffs were the heirs at law of one Toby Kelley, a full blood Creek Indian, who was the sole heir of Sukie Kelley, to whom the land in controversy was allotted as her proportionate part of the lands of the Creek Nation. She died before receiving her allotment, and patents were issued in the name of her heirs, August 6th, 1904."

The opinion showed that the guardian of Toby Kelley, who had been adjudged incompetent, made a void deed to this land. His heirs sued for its recovery. The defendants pleaded the statute of limitations. The court said:

> "*3.* The plaintiffs in erorr have pleaded the statute of limitations. So far as Toby Kelley is concerned, it is plain that his interest in the land in question could be divested only in the manner authorized by federal statute, to-wit, by a sale through the probate court. Having failed to obtain title in this manner, the purchasers could not obtain title by invoking the statute of limitations. The five years' statute of limitations against recovery of lands sold at judicial sale, saving to minors three years after removal of disability, does not apply to actions commenced by restricted Indians for the recovery of their restricted lands. Mills' Oklahoma Indian Land Laws, Sec. 338, citing *Patterson*,

et al., v. *Carter*, 83 Okl. 70, 200 Pac. 855, and other cases."

Other Oklahoma cases holding that lands inherited by full-blood Indians, who are members of the Five Civilized Tribes, are restricted and that, therefore, the statute of limitations of Oklahoma could not bar their recovery are:

Baldridge v. *Caulk*, 110 Okl. 185, at 189;
Tobey v. *DeKinder*, 110 Okl. 63, at 65;
Patterson v. *Carter*, 83 Okl. 70, at 73;
McLish v. *White*, 97 Okl. 150;
Curry v. *Browning*, 123 Okl. 106;
Anthis v. *Drew*, 123 Okl. 18.

Other Oklahoma cases holding such inherited lands restricted and, therefore, not subject to the applications of various Oklahoma statutes are:

Coleman v. *Battiest*, 65 Okl. 71;
Lewis v. *Gillard*, 70 Okl. 231;
Hoodenpyl v. *Champion*, 71 Okl. 270;
Eysenbach v. *Naharkey*, 114 Okl. 217;
Canfield v. *Jack*, 78 Okl. 127;
Murrow Indian Orphan's Home v. *McClendon*, 64 Okl. 205;
Molone v. *Wamsley*, 80 Okl. 181, cited approvingly in
Sperry Oil and Gas Co. v. *Chisholm, supra.*

The opinion in *Baldridge* v. *Caulk, supra*, said:

"We are further of the opinion that the interest of the heirs who are restricted from alienating their interest by the laws of the United States could be conveyed only in the manner provided by the laws of the

United States, and that such heirs could not be divested of their title by a state statute of limitations."

The opinion in *Tobey* v. *Dekinder, supra,* said:

"As we view the case, the question is not whether the creation of a new disability by Congress would arrest the running of the statute of limitations under ordinary circumstances, but whether the government, through Congress, in the exercise of its continuing guardianship over the plaintiffs, having taken the field and legislated concerning the sale and disposition of inherited lands owned by them, did not thereby exclude every other mode of acquiring title to such lands, including title thereof acquired by adverse possession under local statutes of limitations, where such title depended in part for its validity upon adverse possession held after the Act of Congress became effective."

The opinion in *Patterson* v. *Carter, supra,* as a ground for holding the statute of limitations was not applicable to the action, said:

"In the first place, it is well settled that an Indian who is under the guardianship of the United States cannot be divested of his restricted lands, whether acquired by allotment or *inheritance,* in any manner except that provided for by some Act of Congress."

These decision are all based on construction of federal laws. Since the state court has changed its decision as to what the effect of the federal law was, to the detriment of an Indian ward of the United States, a review should be had to determine which of the conflicting decisions of the state court as to the effect of the federal laws are correct.

It now takes nearly four years for the Oklahoma Supreme Court to decide an appealed case unless the same be given a preference. There have been long delays in many

cases pending in the District Courts. Many cases have been reversed for new trials. The result is there are many cases still pending brought prior to April 12th, 1928, in which the determination of the question whether limitations had run as to Indian lands prior to April 12th, 1928, will be decisive of the case.

Review should be had because the decision of the state court refuses to give effect to a valid Act of Congress, because the decision is contrary to the applicable decisions of this court, because the decision as to a matter of federal law is contrary to prior decisions of that court and its change of decision is in the highest degree unjust to the full-blood Indian wards of the United States and because the decision complained of will, if not reversed, be decisive of other pending cases.

Respectfully submitted,

WILLIAM NEFF,
Counsel for Appellant.

Service of the within brief is acknowledged this 10th day of July, 1934.

Counsel for Appellees.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1934.

No. 142

NOAH STEWART, *Appellant,*

vs.

ROBERT KEYES, *ET AL., Appellees.*

BRIEF *of* APPELLANT.

This is an appeal from the Supreme Court of Oklahoma.

The official report of the opinion delivered in the court below is found in 167 Okl. 531.

The grounds of jurisdiction on appeal are that the Supreme Court of Oklahoma held invalid, as applied to the situation here presented, section 2 of chapter 115 of the Act of Congress of April 12th, 1926, 44 Stat. 239, and also applied the state statute of limitations as against the contention of appellant, made in that court, that the state statute could not be applied because in conflict with the laws of the United States.

The grounds of jurisdiction have been argued by appellant in a separate brief opposing the motion of appellees

to dismiss for want of jurisdiction. To this brief appellees filed a reply. Probable jurisdiction has been noted.

The statute of the United States, the validity of which is involved, is section 2, chapter 115 of the Act of Congress of April 12, 1926, 44 Stat. 239, which reads as follows:

> "*Sec. 2.* The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians, and against all rights and causes of action heretofore accrued or hereafter accruing to any such Indians or their heirs or grantees, to the same extent and effect and in the same manner as in the case of any other citizen of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any such Indian, his heirs or grantees, either in his own behalf or by the Government of the United States, or by any other party for his or her benefit, to the same extent as though such action were brought by or on behalf of any other citizen of said state: *Provided,* that no cause of action which heretofore shall have accrued to any such Indian shall be barred prior to the expiration of a period of two years from and after the approval of this Act, even though the full statutory period of limitation shall already have run or shall expire during said two years' period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years' period free from any bar of the statutes of limitations."

Statement of the Case.

The appellant Noah Stewart is an enrolled full-blood Creek Indian, enrolled as 7 years of age at date of enrollment, January 23rd, 1900 (R. 18B). Lizzie Toney was a full-blood Creek Indian (R. 17). In 1902 the lands involved in this action were allotted and patented to the heirs of Lizzie Toney. Appellant was one of the heirs (R. 17-18). Restrictions on the alienation of the land were never removed by the Secretary of the Interior (R. 19). The opinion (R. 1-5) shows a purported guardian of appellant as an incompetent sold his interest in the land and made a guardian's deed which was filed for record on July 12th, 1916. On August 4th, 1917, the County Court made an order discharging the guardian. On April 11th, 1928, appellant brought his action for the recovery of his interest in the land, contending the guardianship was void and that the guardian's sale was void. The appellees demurred to appellant's evidence on the ground, among others, that appellant's cause of action was barred by the statute of limitations. The trial court sustained the demurrer. On appeal appellant contended the statute before quoted gave him until April 12th, 1928, in which to bring his action free from any bar of the statute of limitations and that the state statute of limitations did not apply to his action.

The Supreme Court of Oklahoma held in effect that prior to the enactment of the statute of the United States (44 Stat. 239) before quoted, the state statute of limitations had operated to transfer the title to the property in controversy to the appellees and that to allow the said statute to be given effect in this action would be to deprive appellees of their property without due process of law. It, therefore,

affirmed the judgment of the trial court, the affirmance being placed upon the sole ground that appellant's action was barred by limitations.

Appellant has taken an appeal to this court.

The decisive question in the case is whether prior to April 12th, 1926, the statute of limitations of Oklahoma had operated to transfer title to the property in controversy to the appellees.

ASSIGNMENTS of ERROR.

Appellant's assignments of error are as follows:

1. The Supreme Court of the State of Oklahoma erred in that it held that plaintiff's action, which was brought on April 11th, 1928, was barred by the statute of limitations and in so holding it erroneously held against the validity of the provision of section two, chapter 115 of the Act of Congress approved April 12th, 1926 (44 Stat. 239), which gave Noah Stewart, the plaintiff in error, the right as a restricted Indian to have until April 12th, 1928, in which to bring his action free from any bar of the statute of limitations.

2. The Supreme Court of the State of Oklahoma erred in not rendering judgment for the plaintiff in error as prayed for by him.

ARGUMENT.

The argument will be devoted to sustaining the single proposition that prior to April 12th, 1928, the title of appellant to what was formerly part of the tribal lands of the Creek Nation could not be alienated by the operation of the Oklahoma statute of limitations, and that his action was not, therefore, barred by that statute of limitations.

The sole ground in the opinion of the Oklahoma Supreme Court for holding the statute before quoted did not give appellant until April 12th, 1928, to sue, was that the title to the property in controversy had passed to appellees by operation of the statute of limitations prior to the time the statute was enacted. Further, that is the only ground of objection which could be made to said statute.

The Oklahoma court during the period when the statute of limitations was running, if applicable, held the statute of limitations not applicable and after the expiration of the time when the statute had fully run, if applicable, held such statute applicable. The earlier decisions held inherited lands of full-blood Indians of the Five Civilized Tribes to be restricted. The late decisions held such lands to be unrestricted for the reason that it held restrictions on the alienation of such lands had been removed by section 9 of the Act of May 27, 1908, which holding is in direct conflict with the holding of this court in *Parker* v. *Richard*, *infra*.

The index at the front of the brief contains the various points made.

The historical setting for the case is briefly as follows:

Originally the lands in the eastern part of what is now the State of Oklahoma were held in common by the Five Civilized Tribes. The Act of Congress of May 2nd, 1890 (26 Stat. 81), section 31, extended over Indian Territory certain named chapters of Mansfield's Digest of the Statutes of Arkansas so far as not locally inapplicable or in conflict with any law of Congress. Thereafter by treaties or statutes the lands of the Five Civilized Tribes were alloted in severalty among their members. The Acts of Congress placed various restrictions on the alienation of such formerly tribal lands. The latest of the general acts with regard to restrictions is that of May 27, 1908 (35 Stat. 312). These statutes are set out in Mills' Oklahoma Indian Land Laws, published in 1924.

Oklahoma was admitted as a state on November 16th, 1907. By section 1 of the Enabling Act (34 Stat. 267) the authority of the United States over the Indians and their property in the territories, which were formed into the State of Oklahoma, was expressly reserved.

I.

Except where title to property has passed by reason of a statute of limitations, the legislature may give further time in which to sue even though the time limited by the previous statute has fully run.

—*Campbell* v. *Holt*, 15 U. S. 620, 29 L. ed. 483;

Arcadia Mills v. *Carolina C. & O. Ry.*, 293 Fed. 639, at 645;

Stanley v. *United States Railroad Administration*, 271 Fed. 794;

United States v. *Chicago & E. I. Ry. Co.*, 298 Fed. 779.

II.

The authority of the United States over full-blood Indians and their property is supreme and its authority over such Indians and their property was expressly reserved by section 1 of the Oklahoma Enabling Act (34 Stat. 267). And inherited lands of full-blood Indians of the Five Civilized Tribes are restricted lands.

After referring to the fact that the right to legislate concerning Indians was reserved to Congress by the Oklahoma Enabling Act, this court in *Sperry Oil & Gas Co.* v. *Chisholm*, 264 U. S. 488, at 493, 68 L. ed. 803, at 808, said:

> "Congress was thus careful to preserve to the United States the authority over the Indians, their lands and property, which it possessed prior to the passage of the Enabling Act; retaining full power, which it had exercised from the earliest period, to deal with them as dependent people, and legislate concerning their property with a view to their protection; with the right to determine when, in their interest, the government guardianship should cease, and plenary authority, notwithstanding the bestowal of federal citizenship upon them, to place restrictions upon their right of alienating the lands allotted to them. *Marchie Tiger* v. *Western Invest. Co.*, 221 U. S. 286, 309 * * *."

The term allotted lands is here used as inclusive of allotted lands which have been inherited by members of the Five Civilized Tribes. For *Marchie Tiger* v. *Western Investment Co., supra*, which is cited as authority, was a case concerning restrictions on conveyances by full-blood Indian heirs of allotted lands inherited by them and held such inherited lands to be restricted.

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> "1. *Lands inherited from a Creek allottee by a full-blood Indian heir were not freed from the restrictions on alienation* imposed by the Act of May 27, 1908 (35 Stat. at L. 312), Chap. 199, by the provision of #9 of that act, that the death of any allottee shall operate to remove all restrictions upon the alienation of the allottee's land, '*provided*, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee,' since, as to this class of heirs, restrictions are not removed, but are merely relaxed or qualified to the extent of sanctioning such conveyances as receive the court's approval."

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> "The power of Congress to impose restrictions on the rights of Indian wards of the United States to alienate or lease lands allotted to them in the division of the lands of their tribe is beyond question; and, of course, it is not competent for a state to enact or give effect to a local statute which disregards these restrictions or thwarts their purpose. *Marchie Tiger* v. *Western Invest. Co.*, 221 U. S. 286, 316; • • • *Brader* v. *James*, 246 U. S. 88, 96; • • • *Mullen* v. *Pickens*, 250 U. S. 590, 595. • • •"

While this case concerns an original allotment, the three cases above cited to sustain the opinion concern deeds made by heirs. It is obvious that to permit inaction by a full-blood Indian to alienate his title would thwart the pur-

pose of an act which allowed alienation only upon approval of a federal agency.

Conner v. *Cornell*, 32 F. (2d) 581, *certiorari* denied 280 U. S. 583, held that the authority of the United States with regard to tribal lands inherited by Creek Indians was such that a dismissal with prejudice by the Attorney General of the United States of an action brought by the United States to recover inherited land of an adult Creek Indian conveyed by deed approved by the County Court operated to bar an action by the Indian to avoid the deed.

Kiker v. *United States*, 63 Fed. 957, sustained an action brought by the United States to recover inherited land conveyed by a full-blood Seminole Indian by deed approved by the County Court.

III.

The Oklahoma court correctly held that the effect of the Oklahoma statute of limitations relating to the recovery of real property, where applicable, is to transfer the title to the property to the adverse occupant.

—*Stolfa* v. *Gaines*, 140 Okl. 292;

and other Oklahoma cases quoted from under IV.

This court in *Toltec Ranch Co.* v. *Cook*, 191 U. S. 532, 48 L. ed. 291, said:

> "Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance."

Other cases stating that the effect of statutes of limitations relating to real property is to transfer the title are:

Campbell v. *Holt*, *supra*;
Sharon v. *Tucker*, 144 U. S. 533, 36 L. ed. 532.

IV.

Until recently the Oklahoma courts uniformly held that prior to April 12th, 1928, the state statute of limitations could not apply to actions brought by full-blood Indians to recover their inherited lands for the reason that their lands could not be alienated by a state statute of limitations which had not been put in force by some Act of Congress.

In the case of *Patterson* v. *Carter*, 83 Okl. 70, it was sought to defend against an attack upon a void guardian's deed by setting up the statute of limitations. The opinion in holding the statute of limitations was not applicable said:

> "In the first place, it is well settled that an Indian who is under the guardianship of the United States cannot be divested of his restricted lands, whether acquired by allotment or *inheritance*, in any manner except that provided for by some Act of Congress."

In *Lytle* v. *Fulotka*, 106 Okl. 86, 233 Pac. 456, the opinion states:

> "Plaintiffs were the heirs at law of one Toby Kelley, a full blood Creek Indian, who was the sole heir of Sukie Kelley, to whom the land in controversy was allotted as her proportionate part of the lands of the Creek Nation. She died before receiving her allotment, and patents were issued in the name of her heirs, August 6th, 1904."

The opinion showed that the guardian of Toby Kelley, who had been adjudged incompetent, made a void deed to this land. His heirs sued for its recovery. The defendants pleaded the statute of limitations. The court said:

> "*3.* The plaintiffs in error have pleaded the statute of limitations. So far as Toby Kelley is concerned, it is plain that his interest in the land in question could be divested only in the manner authorized by federal

statute, to-wit, by a sale through the probate court. Having failed to obtain title in this manner, the purchasers could not obtain title by invoking the statute of limitations. The five years' statute of limitations against recovery of lands sold at judicial sale, saving to minors three years after removal of disability, does not apply to actions commenced by restricted Indians for the recovery of their restricted lands. Mills' Oklahoma Indian Land Laws, Sec. 338, citing *Patterson, et al.*, v. *Carter*, 83 Okl. 70, 200 Pac. 855, and other cases."

Other Oklahoma cases holding that lands inherited by full-blood Indians, who are members of the Five Civilized Tribes, are restricted and that, therefore, the statute of limitations of Oklahoma could not bar their recovery, are:

Baldridge v. *Caulk*, 110 Okl. 185, at 189;
Tobley v. *DeKinder*, 110 Okl. 63, at 65;
McLish v. *White*, 97 Okl. 150;
Curry v. *Browning*, 123 Okl. 106;
Anthis v. *Drew*, 123 Okl. 18.

The opinion in *Baldridge* v. *Caulk, supra*, said:

"We are further of the opinion that the interest of the heirs who are restricted from alienating their interest by the laws of the United States could be conveyed only in the manner provided by the laws of the United States, and that such heirs could not be divested of their title by a state statute of limitations."

The opinion in *Tobley* v. *DeKinder, supra*, said:

"As we view the case, the question is not whether the creation of a new disability by Congress would arrest the running of the statute of limitations under ordinary circumstances, but whether the government, through Congress, in the exercise of its continuing guardianship over the plaintiffs, having taken the field

and legislated concerning the sale and disposition of inherited lands owned by them, did not thereby exclude every other mode of acquiring title to such lands, including title thereof acquired by adverse possession under local statutes of limitations, where such title depended in part for its validity upon adverse possession held after the Act of Congress became effective."

Other Oklahoma cases holding such inherited lands restricted and, therefore, not subject to the application of various Oklahoma statutes which by their terms would affect the alienation of the title to such lands, are:

Coleman v. *Battiest*, 65 Okl. 71;
Lewis v. *Gillard*, 70 Okl. 231;
Hoodenpyl v. *Champion*, 71 Okl. 270;
Eysenbach v. *Naharkey*, 114 Okl. 217;
Canfield v. *Jack*, 78 Okl. 127;
Murrow Indian Orphan's Home v. *McClendon*, 64 Okl. 205;
Malone v. *Wamsley*, 80 Okl. 181, cited approvingly in
Sperry Oil and Gas Co. v. *Chisholm, supra.*

V.

The reasoning of those Oklahoma cases is sustained by the language used by this court in *Sperry Oil & Gas Co. v. Chisholm, supra*, page 494 of 284 U. S.

This court there said:

"And in all matters relating to the restrictions upon their allotted lands resort must be had to the Acts of Congress and to those acts alone. *Walker* v. *Brown*, 43 Okl. 144, 141 Pac. 681; *Collins Invest. Co.* v. *Beard*, 46 Okl. 310; *Wilson* v. *Greer*, 50 Okl. 387, 151 Pac. 629; *Smith* v. *Williams*, 78 Okl. 297, 190 Pac. 555; *Malone* v. *Wamsley, supra.*" (80 Okl. 181.)

Malone v. *Wamsley*, cited above, dealt with inherited land. It quoted approvingly the following:

> "The reason the state cannot legislate for an Indian of the Five Civilized Tribes is that Congress has reserved the right to legislate for him as a dependent people."

The case of *Sperry Oil & Gas Co.* v. *Chisholm* also cited *Marchie Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309, as authority, which latter case dealt with inherited land of a Creek full-blood Indian.

It is clear that tribal lands in the hands of full-blood Creek Indians are subject to the control of the United States whether obtained by direct allotment or by inheritance. Appellant, however, received the land in controversy by direct allotment.

VI.

The cases cited by the Oklahoma court to sustain its conclusion that:

> **"The right of the plaintiff to have the guardian's deed in question cancelled was barred by the applicable statutes of limitations prior to the commencement of this action, even though, as contended by the plaintiff, that deed was *void*,"**

are not applicable and for the most part were not Indian cases. The Indian cases are not applicable and were not correctly decided.

As before pointed out cases stating general rules of law are not decisive as to questions arising relating to restricted Indians.

—*Bunch* v. *Cole*, *supra*.

The case of *Harris* v. *Bell*, 254 U. S. 103, 65 L. ed. 159, is cited. That case merely held that heirs are not governed by the restrictions on alienations applicable to living allottees and that adult heirs are under different restrictions from mipor heirs. The opinion was written by Mr. Justice VAN DEVANTER and was rendered November 15, 1920. *Parker* v. *Richard, supra,* was also written by Mr. Justice VAN DEVANTER. There is no conflict between the two opinions.

Of the Oklahoma cases cited, the first which is a restricted Indian case is *Dierks* v. *Isaac,* 114 Okl. 158, 244 Pac. 750. That case, however, concerned a guardian's deed of the land of a minor while the deed in this case concerned the land of an adult. That case was decided on the theory that the land of a full-blood Indian minor is not restricted land.

The writer of the opinion was Mr. Justice PHELPS. At a later time he concurred in an opinion written by Mr. Justice RILEY in No. 16989, *Critchlow* v. *Bacon,* XLVIII Oklahoma Appellate Court Reporter 198, in part as follows:

> "Summarizing the facts here:
>
> "Ellen Bacon, a full-blood Indian minor, inherited an undivided one-half interest in certain royalties from Silly Frazier, a full-blood Indian. During Ellen's minority her undivided one-half interest in these royalties were sought to be disposed of by a procedure beyond the jurisdiction of the County Court. Ellen died March 19, 1918, and her father, Dan Bacon, a full-blood Indian, inherited the interest from her. More than five years after the purported guardianship sale and on October 8, 1923, Dan Bacon instituted the present action. His suit was commenced less than five years from December 28, 1918, when he executed his deed.
>
> "We are of the opinion that it was the intention of Congress under the proviso to section 9 of the Act

of May 27, 1908, c. 199, 35 Stat. 312, that lands of a deceased allottee should be restricted as long as the same were inherited by full-blood heirs and until the restrictions upon such lands should expire by operation of law, which under the provisions of the act, would be April 26, 1931. *Brown* v. *Marshall*, 83 Okl. 98; *Thompson* v. *Smith*, 227 P. 77. • • •

"*Bell* v. *Fitzpatrick*, 53 Okl. 574, 157 P. 334, holds that the statutes of limitation are never set in motion by a void conveyance to an Indian minor's allotted land. *Burkhalter* v. *Vann*, 59 Okl. 114; *Bluejacket* v. *Everett*, 42 S. Ct. 442.

"In *Patterson* v. *Carter*, 83 Okl. 72, it was held concerning a federal restriction, that an Indian 'cannot be divested of restricted lands, whether acquired by allotment or by inheritance, in any manner except that provided by some Act of Congress' and that only 'in the manner provided by law.' *Baldridge* v. *Calk*, 110 Okl. 185; *Blonset* v. *Cardin*, 41 S. Ct. 519; *McLish* v. *White*, 97 Okl. 150.

"In *Parker* v. *Richards*, 39 S. C. 442, the Supreme Court of the United States held relative to removal of restrictions on alienation of allotted lands by the death of the allottee:

> 'In other words, as to that class of heirs (full-blood Indian heirs) the restrictions are not removed, but merely relaxed or qualified to the extent of sanctioning such conveyances as receive the court's approval • • • entertaining a like view of the proviso, we conclude that the land covered by the lease *is still restricted land* • • •. The heir is a full-blood Indian, as was the allottee, and is regarded by the act as in need of protection, as was the allottee.'

"We hold, therefore, that the lands were restricted lands at the time of the conveyance of royalties in 1916, and compliance with the laws of Oklahoma was essential to alienation of the ward's realty.

"Just as was held in *Tirey* v. *Darneal*, 37 Okl. 608, 133 P. 614:

> 'Section 6 of the Act of Congress approved May 27, 1908 (35 Stat. at L. 313, c. 199), which deals with the subject of the removal of restrictions from the lands of allottees of the Five Civilized Tribes provides that the persons and property of minor allottees of said Five Civilized Tribes, shall, except as otherwise specifically provided by law, be subject to the control and jurisdiction of the probate courts of the State of Oklahoma. This provision of that act is in the nature of a restriction by Congress on the alienation of land belonging to minor allottees, and can be removed only through the instrumentality of the County Court.'

We hold that the guardian's deed failed to convey the interest of the minor.

"We have reviewed *Dierks* v. *Isaac* (July 7, 1925), 114 Okl. 158, cited as supporting the contention of plaintiff in error. There the purchase price was paid. It was adequate. Appraisers were appointed. It did not affirmatively appear that appraisement was had. It was there held the restriction concerning such inherited land was a personal restriction rather than a restriction upon the land. The conclusion was there reached because the deed was not void on its face. There was a conveyance and the land passed into the possession of the purchaser and so remained ten years before suit. But here the deed is void on its face—the deed concerns royalty—possession of the surface did not pass with the guardian's deed. We hold the cited case not decisive of the issue here, for here the approval of the void deed conveyed nothing.

"In *Chupco* v. *Chapman, supra*, the sale had been made 'in all respects as now provided by the laws of the state * * *.' Not so in the case at bar. There it was said 'in fact no serious contention is made that said

sales were void on account of any defect in the proceedings under the probate laws of the state.'

"Other cases bearing upon the subject of limitations are *Lytle* v. *Fulotka*, 106 Okl. 86, 233 P. 356; *Brown* v. *Menshall*, 83 Okl. 98.

"We are of the opinion that this cause of Dan Bacon is not barred by the statute of limitations. Having so held we see no reason for further considering the position of the parties claiming benefit of the statute, nor the alleged acts of fraud on the part of the plaintiffs in error as precluding them from asserting the statute of limitation."

It is true that the opinion in that case was later set aside as to another issue in the case and a new opinion was written, *Critchlow* v. *Bacon*, 142 Okl. 168, which does not mention limitations.

As opposed to the contention that the lands of Indian minors which under the Act of May 27th, 1908, may be lawfully sold through the County Court are not restricted, we call attention to the case of *O'Conner* v. *Johnson*, 107 Okl. 5, at 8, which says:

"This provision is tantamount to a restriction upon the sale * * *."

The other Indian cases cited to sustain the holding are:

Bearhead v. *American Investment Co., et al.*, 157 Okl. 84, 10 P. (2d) 1086 (April 26, 1932);

Washington v. *Bartlett*, 158 Okl. 218, 13 P. (2d) 132 (July 19, 1932);

Givens v. *Jones*, 158 Okl. 124, 12 P. (2d) 892 (June 28th, 1932);

Deere v. *Gypsy Oil Co.*, 160 Okl. 237, 15 P. (2d) 1086 (March 29th, 1932).

All these cases concerned sales made by guardians of full-blood Indian minors. They do not involve a sale made by a guardian of an adult full-blood Indian. None of these cases was correctly decided. None of the opinions in these cases was based on correct principles of law. *Deere* v. *Gypsy Oil Co.*, *supra*, holds:

> "Under the provisions of section 9 of the Act of Congress of May 27, 1908, the death of an allottee of the Five Civilized Tribes operated to remove all restrictions upon the alienation of said allottee's land."

This holding is squarely contrary to the holding of this court in *Parker* v. *Richard*, *supra*.

These cases erroneously fail to distinguish between a case where there is no right to alienate at all and a case where there is a right to alienate upon compliance with federal law. Under the doctrine of *Parker* v. *Richard*, *supra*, and *O'Conner* v. *Johnson*, *supra*, the land is restricted in both cases. But these late Oklahoma cases say contrary to what was said by this court in *Parker* v. *Richard* that land is restricted only where its alienation is absolutely prohibited.

VII.

A void order of sale of land continues to be void no matter how great the lapse of time. Where title passes after the lapse of a period of time from the making of the order it passes by reason of the adverse possession and not by reason of the void order which of itself cannot give rights.

In *Frazier* v. *Jeakins*, 64 Kan. 615, 68 Pac. 24, 57 L. R. A. 575, it was said:

> "If the act or transaction failed to deprive inter-

ested persons of their rights or titles, failed to confer them on someone else, the act or transaction is void as to such persons. If the act or transaction requires ratification, estoppel, or limitation to transfer the right or title, it is void until the ratification has been made, the estoppel has occurred, or the time has elapsed, and even then the right or title does not pass by virtue of the original act or transaction, but passes by virtue of the ratification, or is founded on the estoppel, or is set at rest by the lapse of time."

In *Sandlin* v. *Barker*, 95 Okl. 113, at 119, it is said:

"Without regard to the right to set aside the judgment ordering the sale of this real estate and confirming the administrator's sale, the purchaser at such sale who has gone into possession under the administrator's deed cannot be deprived of the property so purchased unless the action is maintained within the time provided in subdivision 2, section 46655, Rev. Laws 1910, or within the additional time of two years after the minor reaches his majority, if the five years' period runs before that time. This holding does not in any manner attempt to give life to a void judgment, which, as was said in *Pettis* v. *Johnston*, *supra*, 'Is a dead limb upon the judicial tree,' but simply precludes the holder of the title from asserting his title. This is very aptly expressed in *Grossbeck* v. *Seeley*, 13 Mich. 329, in the following language:

> 'If the proceedings to sell for taxes were illegal, no lapse of time can change their character, and they can never, therefore, become legal. If the tax purchaser obtains possession, and holds it until protected by a limitation law, he then becomes safe, not because his tax title is any more regular, but because the holder of the better title has become incapable of asserting it'."

VIII.

The Act of May 27th, 1908 (35 Stat. 312), did not make the interest of appellant free from restrictions on alienation even though the guardianship had been valid. It did not give any right to a guardian to alienate the inherited land of an adult full-blood Indian.

Appellees in their former brief seem to argue that since appellant was under guardianship his inherited land was free from all restrictions on alienation. The Act of May 27th, 1908, nowhere gives the guardian of an incompetent adult Indian the right to sell his land. Section 6 of that act only mentions "minors" and not "incompetents." Guardians of incompetents are given the right to lease but not the right to sell the land of their wards.

Appellees cited the following from Act of April 28, 1904 (33 Stat. 573):

> "And full and complete jurisdiction is hereby conferred upon the District Courts in said territory in the settlement of all estates of decedents, the guardianship of minors and incompetents, whether Indian, freedman or otherwise."

There is nothing in this language which purports to give the guardian of an adult incompetent the right to sell his land.

That the land of the estate of a deceased Indian inherited by full-blood Indians could not be partitioned without further authorization from Congress was held in

Eysenbach, et al., v. *Naharkey*, 114 Okl. 217;
Coleman v. *Battiest*, 65 Okl. 71;
Lewis v. *Gillard*, 70 Okl. 231;
Hoodenpyl, et al., v. *Champion*, 71 Okl. 270.

Further, since as appellant contends the guardianship was void and the sale was void, the status of appellant so far as concerns restrictions on alienation of his land was the same as if there had been no purported guardianship. A void guardianship is the same as no guardianship.

Conclusion.

We respectfully request that this court hold regarding the statute of limitations of Oklahoma as was held by the Oklahoma court during the period of time when it is now contended the statute of limitations was running against appellant and reverse the judgment of the Oklahoma Supreme Court.

Respectfully submitted,

WILLIAM NEFF,
Counsel for Appellant.

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GENERAL STATEMENT 1

The guardian's sale was absolutely void for the reason there is no statute of the United States which authorizes a guardian of an incompetent full-blood Indian to sell his restricted land where the restrictions on the alienation of such land have not been removed by the Secretary of the Interior. The Acts of Congress putting in force in the Indian Territory the probate laws of Arkansas did not give a right to a guardian of an incompetent to sell restricted Indian land. But even if such Acts of Congress did give such right of sale, still the guardian's sale involved in this case, was absolutely void for the reason that under the Arkansas law a guardian could not be appointed for one who was not of unsound mind and a guardian of an incompetent could not sell the land of his ward to obtain money to improve other land of his ward 2

Assuming the right to make the guardian's sale involved in this case existed, if made according to the Oklahoma law, the guardian's sale was absolutely void under the Oklahoma law on four different grounds 10

(1) The Oklahoma statutes permit a ward over the age of 14 to nominate his own guardian. The nominee of the ward in this case was not appointed and was not found to be unsuitable for appointment 12

(2) The order declaring Noah Stewart an incompetent and providing that John A. Jacobs should act for him as guardian of Noah Stewart, incompetent, was void for the reason the proceedings were not in compliance with the mandatory, jurisdictional requirements of the Oklahoma statutes and were void 13

(3) There was a failure to comply with Rule Number V governing procedure in probate matters effective July 15, 1914, and the sale was therefore void 16

(4) The guardian's deed was void because the land was in Seminole County, Oklahoma, there was no appraisement of the land and the actual sale was in Hughes County, Oklahoma 18

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1934.

No. 142

NOAH STEWART, *Appellant,*

vs.

ROBERT KEYES, *ET AL., Appellees.*

REPLY BRIEF *of* APPELLANT.

General Statement.

The purpose of this brief is to discuss Proposition II of the appellees, that the guardian's deed involved in this case was and is valid.

It is the contention of appellant that this deed was void on grounds of federal law because the land could not be conveyed by a guardian, for the purpose for which it was sold, without restrictions on alienation having been removed.

It is the further contention that if under federal law the land could be sold by a valid guardianship sale, then the sale was absolutely void under the laws of Oklahoma on four different grounds, as follows:

That the statutory right of the ward to nominate his guardian was disregarded.

That the mandatory provisions of the statute governing the matter of adjudging Noah Stewart incompetent and appointing a guardian for him were not complied with in that no verified petition was filed, in that five days' notice of hearing was not given, and in that the guardian for him as an incompetent neither took the oath nor gave the statutory bond.

That Rule V of the Supreme Court of Oklahoma, which had the force of law, was disregarded in the sale proceedings in that the ward was not present in court when the order for sale was made and was not examined as to the necessity for the sale and no transcript of the testimony taken at the hearing was filed.

That the land was sold without appraisement and the real sale was in Hughes County while the land sold was in Seminole County, Oklahoma.

Before taking up these propositions attention is called to the fact that *Joines* v. *Patterson,* 274 U. S. 544, which is relied upon by appellees, only held the following:

> "Under the settled construction given to the seven-year statute of limitations by the courts of Arkansas, it began to run against Patterson when Joines took possession."

The opinion also discloses that Patterson was a white man and was not of Indian blood.

I.

The guardian's sale was absolutely void for the reason there is no statute of the United States which authorizes a guardian of an incompetent full-blood Indian to sell his restricted land where the restrictions on the alienation of such land have not been removed by the Secretary of the

Interior. The Acts of Congress putting in force in the Indian Territory the probate laws of Arkansas did not give a right to a guardian of an incompetent to sell restricted Indian land. But even if such Acts of Congress did give such right of sale, still the guardian's sale involved in this case, was absolutely void for the reason that under the Arkansas law a guardian could not be appointed for one who was not of unsound mind and a guardian of an incompetent could not sell the land of his ward to obtain money to improve other land of his ward.

The following stipulation was made:

> "It is hereby stipulated and agreed by and between the parties hereto, that the restrictions on the allotment of Lizzie Toney have never been removed by the Secretary of the Interior as provided for by Acts of Congress as relative to said action, and that the restrictions on the allotment of Noah Stewart had never been removed as provided for." (R. 19)

The federal question which has to be decided in determining whether the guardian's sale of this land from which the restrictions on the sale had never been removed was valid, is whether the probate court of Oklahoma had jurisdiction to decree a sale of the land of one adjudged incompetent under the Oklahoma statute,

> "for the purpose of proper maintenance and support of said ward, and for the further purpose of applying the proceeds of said sale to the improvement of the allotment of said ward, * * *."

The federal statutes relating to incompetent Indians are collected in the appendix to the brief of the appellees. None of them purport to give a guardian the right to sell such lands. On the other hand they do purport to give guardians of minors the right to sell their lands. The statutes set out in the appendix to the brief of appellees recog-

nize the right of guardians of incompetent Indians to do certain specific things including the making of leases upon the land of their wards. The statutes of the United States contain no provision which expressly or by reasonable inference could give the probate courts of Oklahoma authority to decree the sale by a guardian of the restricted land of an adult full-blood Indian, where the Secretary of the Interior has not made an order removing the restrictions on the alienation of the land.

There has been no need for such general right of sale.

The Oklahoma courts have always held that land inherited by adult full-blood Indians are not subject to taxation.

—*Marcy* v. *Board of Commissioners of Seminole County*, 45 Okl. 1, 144 Pac. 611;
Watkins v. *Howard*, 64 Okl. 166, 166 Pac. 706.

Ordinarily it would be for the best interest of the Indian to not sell the tax exempt property but to have the same leased and retain the income from the property. An exceptional case could be taken care of by having the Secretary of the Interior remove the restrictions from the alienation of the land.

The opinion in *Lytle* v. *Fulotka*, 106 Okl. 86, 263 Pac. 456, states that the probate courts of Oklahoma have jurisdiction to decree the sale of the inherited land of an adult incompetent full-blood Indian. In that case, however, the sale involved was held void. The statute which the court in that case thought gave authority for such sale is the Act of April 28, 1904, putting in force in the Indian Territory the probate laws of Arkansas as to Indians. This statute is quoted at page 72 of the brief of appellees.

By section 31 of the Act of May 2, 1880 (26 Stat. 81), the general laws of Arkansas, as contained in specified chapters of Mansfield's Digest, were made the local laws for Indian Territory. The statute is quoted at pages 70 to 71 of the brief of appellees. The Indians had their own tribal laws. The purpose of the Act of April 28th, 1904, was to put in force the probate laws of Arkansas as to Indians. It was not its purpose to remove restrictions on the alienation of Indian lands nor to give a right of alienation of restricted lands. Further legislation was deemed necessary to give the right to alienate inherited lands of minors. The enactment of such legislation was a legislative recognition of the fact that the Act of April 28th, 1904, did not give the probate courts the right to decree the sale of lands of minor Indians.

The opinion in *Lytle* v. *Fulotka*, without citing any cases, assumes that probate jurisdiction under the laws of Arkansas included the right to decree the sale of lands of an incompetent for *all* the reasons specified in the Oklahoma statutes. This assumption was not well founded.

The Supreme Court of Arkansas in *Storthz* v. *Sanger*, 108 Ark. 154, 156 S. W. 1020, in holding that a provision in a lease made by the guardian of an insane person giving the lessee an option to purchase was void although the lease was authorized by the probate court, said:

> "It is very clear that this was not within the jurisdiction of the probate court, which is confined with respect to the property of infants and insane persons, to such limits as are prescribed by the statute. In other words, the court possesses only such powers as the statute confers. This rule is stated by Judge EAKIN, in the case of *Myrick* v. *Jacks*, 33 Ark. 425, as follows: 'Courts of probate have, by the statute, been entrusted

with some limited powers over the estates of minors in the hands of administrators and guardians and within the scope of these statutory powers they are certainly entitled to all presumptions accorded to superior courts of record. But they had no such jurisdiction by common law, and beyond the limits given they have none now.' * * *

"This rule applies, of course, to orders with respect to the property of persons of unsound mind as it does to the property of the estates of decedents and of infants."

From May 2nd, 1890, to November 16, 1907, the local laws in force in the Indian Territory for the most part were the laws of Arkansas which were put in force by Acts of Congress. Under the laws of Arkansas a guardian could be appointed for a person as an incompetent only when the person was of *unsound* mind. Under the Oklahoma law which became effective on November 16, 1907, a guardian could be appointed for a person as an incompetent if he was "from any cause mentally incompetent to manage his property * * *." The Oklahoma statute is set out in the appendix.

In *Shelby* v. *Farve*, 33 Okl. 651, 126 Pac. 764, it was said:

"It is to be noted that the court found specifically that the parties for whom the guardian was sought were so ignorant in so far as the value of their property is concerned, that it was probable that they would make improvident disposition of the same."

It was held that this fact gave the court the right to appoint a guardian.

In the case of *In re Carney's Guardianship*, 110 Okl. 165, 237 Pac. 111, the following conclusion of law was approved:

"2. That one who is mentally normal but who, through lack of education and training is unable, unassisted, to properly manage and take care of himself or his property and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons, is incompetent."

The Arkansas law giving the right to appoint guardians for incompetents and defining their powers is chapter 82 of Mansfield Digest. Section 3767 provides:

"Probate courts, within their respective counties, shall have power and jurisdiction to appoint and possess a superintending control over, guardians to take the care, custody and management of idiots, lunatics, habitual drunkards and persons of unsound mind *(a)*, who are incapable of conducting their own affairs and their estates real and personal, and to provide for the safe keeping of such persons, the maintenance of themselves and their families, and the education of their children, in the manner hereinafter directed."

The note says, "(a) see Art. VII, Sec. 34, Const."

Said section of the Constitution provides:

"The judge of the County Court shall be the judge of the court of probate, and shall have such exclusive original jurisdiction in matters relative to * * * guardians and persons of unsound mind and their estates as is now vested in the Circuit Court, or may be hereafter prescribed by law."

Said chapter of Mansfield's Digest of the Statutes of Arkansas, which was put in force in the Indian Territory, contains no provision authorizing the sale of lands of a person of unsound mind for the purpose of obtaining money for the improvement of other land. See statutes in appendix.

Under the said provisions of Arkansas law a person must have been of unsound mind before a guardian could be appointed for him. Under the Oklahoma law such person need not be of unsound mind. Under said provisions of Arkansas law the land of a person of unsound mind under guardianship could not be sold to obtain money to improve other land. Under the Oklahoma law the land of a person under guardianship as an incompetent could be sold to obtain money to improve other land.

Since the Arkansas law was the local law governing guardianships when the word "incompetent" was used in statutes for the Indian Territory, it must be deemed to have the meaning it had under the Arkansas law, that is a person who was of unsound mind or a habitual drunkard. Under that law there was a general right in the guardian with the approval of the court to lease the land of his ward who was of unsound mind but the right to sell such land was very limited.

Appellant contends that under the various statutes putting in force the laws of Arkansas in the Indian Territory, a guardian of an incompetent had, with the approval of the probate court, the right to lease the land of his ward but did not have the right to sell such land; that the fact that the statutes affirmatively gave guardians of minors the right to sell lands of minor wards but did not give guardians of incompetents the right to sell lands of incompetent wards shows that guardians of incompetent wards had not been given the right to sell their lands. The statute which *Fulolka* v. *Lytle, supra,* states gave guardians of incompetent wards the right to sell their lands applied to minors also. Subsequent legislation was a recognition of the fact that

said statute did not give guardians of minor wards the right to sell their land.

Appellant further contends that the laws of Oklahoma governing the right to appoint a guardian for a person as an incompetent and the right of a guardian of an incompetent to sell his ward's land are so different from the laws of Arkansas which were put in force in the Indian Territory that, as to restricted Indian lands, after November 16, 1907, the laws of Oklahoma did not become effective because there was no Act of Congress putting such laws in effect as to lands of restricted Indians. Even assuming that the statement in *Fulotka* v. *Lytle* to the effect that the Act of April 28, 1904, did give the guardian of a person for whom a guardian could be appointed under the Arkansas law the right to sell the land of his ward for the reasons specified in the Arkansas law and that after the admission of Oklahoma as a state the probate laws of Arkansas which had been put in force in the Indian Territory continued in force and were to be administered by the probate courts of Oklahoma, was correct, still the sale in this case was absolutely void for under the Arkansas law there was no jurisdiction to appoint the guardian and under the Arkansas law there was no jurisdiction to sell the land for the purpose of obtaining money to improve other land of the ward.

II

Assuming the right to make the guardian's sale involved in this case existed, if made according to the Oklahoma law, the guardian's sale was absolutely void under the Oklahoma law on four different grounds.

The record as to the guardianship proceedings up to the guardian's sale is in substance as follows:

Noah Stewart was enrolled as a full-blood Creek Indian and as seven years of age on January 23, 1900 (R. 18b).

On July 20th, 1909, John A. Jacobs was appointed guardian of Noah Stewart, who was at that time 16 years of age.

On September 26th, 1910, there was filed a paper signed by Noah Stewart nominating Albert P. Stewart as his guardian.

On October 5th, 1910, John A. Jacobs filed his resignation as guardian.

On January 5th, 1914, an order was made by the County Court of Hughes County refusing to accept the resignation of John A. Jacobs and ordering,

> "that John A. Jacobs hereafter shall act for the said Noah Stewart, as guardian of Noah Stewart, incompetent, and shall be governed by the laws relating thereto."

On June 9th, 1918, the County Court of Hughes County made an order authorizing John A. Jacobs as guardian of the estate of Noah Stewart to sell at public sale an undivided one-half interest in Southwest Quarter of Section Four, Township 10 North, Range 8 East, Seminole County, Oklahoma.

There was no compliance with Rule 5 of the Supreme Court of Oklahoma then in force which required that the ward when over 18 years of age must be present and must be examined as to the necessity for said sale and the truth of the allegations of the petition. The order made recites the appearances but does not show Noah Stewart was present.

An order confirming a sale to Robert Keyes for $675 was made on July 11th, 1916. This order shows that the actual sale was made in Hughes County, Oklahoma, at which place Robert Keyes, who had bid $600 at the sale had in Seminole County, made a new bid of $675,

"which said bid is accepted by the court and the guardian."

Among the defects in the proceeding were the following:

Since Noah Stewart was over 14 years of age, he had a statutory right to nominate a suitable person as his guardian. He nominated Albert P. Stewart. The County Court was required to appoint Albert P. Stewart as the guardian of Noah Stewart, a minor, for the County Court made no finding that the nominee of the minor was not a proper and suitable person to be guardian.

There was no compliance with the mandatory and jurisdictional requirements of the Oklahoma statutes in proceedings for the appointment of a guardian of an incompetent in that there was no verified petition alleging incompetency, there was not five days' notice of hearing and no oath was taken by the purported guardian and no bond was given.

In the hearing for the sale of the land of Noah Stewart, Rule V of the Supreme Court of Oklahoma was disregarded.

The land was sold without appraisement and the real sale was in Hughes County while the land was in Seminole County.

(1) ***The Oklahoma statutes permit a ward over the age of 14 to nominate his own guardian. The nominee of the ward in this case was not appointed and was not found to be unsuitable for appointment.***

The syllabus to *Given* v. *Pollock*, 96 Okl. 25, 219 Pac. 898, reads:

> "Where a minor who has attained the age of fourteen years appoints his own guardian under section 6529, Rev. Laws 1910, such appointment is subject to the approval of the county judge, but the only discretion which can be exercised by the county judge is as to whether the nominee is a suitable and competent person and resides in the state; and, unless the nominee was unsuitable and incompetent or a non-resident of the state it was error to refuse to approve the nominee."

The statute (section 1425, O. S. 1931) provides:

> "If the minor is under the age of fourteen years, the county judge may nominate and appoint his own guardian, who, if approved by the judge, must be appointed accordingly."

It was held in *Coker* v. *Moore*, 121 Okl. 219, 249 Pac. 694, that a sale of land made by a guardian who had been appointed in violation of this statute, was absolutely void.

It was held in *Re Guardianship of Baptiste*, 114 Okl. 116, 243 Pac. 938, that the statutes providing for the appointment of guardians are mandatory and must be sub-

stantially complied with in order to give the court jurisdiction to make the appointments.

In Oklahoma county judges hold office for only two years, unless re-elected. Guardianships are regarded as political patronage. Therefore, statutes should be construed so as to give wards the right to select their guardians and to prevent, as far as possible, guardians who are objectionable to wards from being named because they are a part of the political machine of a county judge.

(2) ***The order declaring Noah Stewart an incompetent and providing that John A. Jacobs should act for him as guardian of Noah Stewart, incompetent, was void for the reason the proceedings were not in compliance with the mandatory, jurisdictional requirements of the Oklahoma statutes and were void.***

The Oklahoma statutes are set forth in the appendix. There was no verified petition alleging incompetency. There was no five days' notice of hearing. John A. Jacobs neither took the oath nor filed a bond as guardian of Noah Stewart, an incompetent. No letters of guardianship were issued to him as such guardian. His sole authority to act as such guardian was based on a mere court order directing him to so act.

In *Tiger* v. *McCallom*, 89 Okl. 249, 214 Pac. 194, it was held that the verified petition is jurisdictional. The court, after quoting the statute, said:

> "This statute was construed in *Martin* v. *O'Reilly, County Judge*, 81 Okl. 261, 200 Pac. 687, by this court, and held to be mandatory, and unless the provisions of said statute are complied with, the court is without jurisdiction to hear and determine such a proceeding."

In *Martin* v. *O'Reilly, supra,* the Oklahoma court cited approvingly the case of *McGee* v. *Hayes,* 127 Cal. 336, 59 Pac. 767, which said:

> "Respondent contends that the personal presence of the incompetent at the hearing cured any defects in the notice and that by his presence he consented to the order and waived notice, and that the order so shows on its face. The presence of the incompetent could not supply the requirement of the statute that he should be served with notice of the hearing."

The Oklahoma Supreme Court in the case of *In re Guardianship of Winnett,* 112 Okl. 43, 239 Pac. 603, held:

> "By virtue of section 1449, C. O. S. 1921, when a petition is filed in the County Court praying that a person be declared insane or from any cause mentally incompetent to manage his property, all proper parties to such proceedings must be given five days' notice of the time and place of hearing the application, and the court acquires no jurisdiction to hear the cause until the five days' notice provided for by the statute has elapsed."

In this case Noah Stewart was a full-blood Indian. The restrictions on the alienation of his land had never been removed by the Secretary of the Interior. Representatives of the Interior Department were entitled to be represented in any proceedings for the appointment of a guardian for him as an incompetent.

—*Buell* v. *McKinney,* 113 Okl. 92, 239 Pac. 467;
In re Hickory's Guardianship, 75 Okl. 79, 182 Pac. 233.

Reasons of public policy require that the statutory requirements be held jurisdictional. The appointment of a guardian deprives a person of all right to contract. It deprives him of the right to contract to pay an attorney to

represent him. Therefore, he should have reasonable opportunity to prepare for hearing in a proceeding which may deprive him of the right to manage his own property. If he be in fact incompetent then those interested in his well being should have reasonable opportunity to be heard so as to prevent an unfit person from being appointed his guardian and so as to secure the giving of a proper bond. Here no bond at all was given.

Appellees cite as sustaining the procedure following in this case, the case of *Mullen* v. *Glass, et al.*, 43 Okl. 549, 143 Pac. 679. That case materially differs from this case. That case involved the lease of land and not the sale of land. The guardian who had been appointed was appointed by the United States Court for the Central District of Indian Territory. The opinion states:

> "* * * at the same time appeared Solomon Harris in person, together with his adult brothers and their attorney, and the court then found that Solomon Harris was an *imbecile* and incompetent to transact his own affairs, and that it would not be for the best interest of said Solomon Harris to discharge his guardian."

These facts show that the relatives of an imbecile were present at the hearing and were represented by an attorney. There must have been some prior notice to cause them to come to court. Such were not the facts in this case.

It is true as held in that case that the guardianship of a minor incompetent does not terminate by operation of law upon such minor attaining majority.

Under the Oklahoma law proceedings for adjudging a minor incompetent may be had and a guardian may be appointed for a minor as an incompetent. *Johnston* v. *Guy*, 165 Okl. 156, 25 P. (2d) 625.

In this case the original appointment of the guardian was solely on the ground of minority of the ward. It was not based on the additional ground of incompetency. Therefore the powers of the guardian terminated at the time the ward became of age.

Mullen v. *Glass, supra,* does not decide the questions involved in this case. The law governing this case is to be found in the California decisions construing the California statute, governing guardianship of incompetents, which was adopted by Oklahoma and in the Oklahoma cases construing the statute after its adoption.

Under these decisions a verified petition alleging incompetency is jurisdictional and five days' notice of hearing must be given or there is no jurisdiction to proceed to appoint a guardian.

Under the Oklahoma law the right of a man to manage his own property cannot be taken away through incompetency proceedings unless he be given reasonable opportunity to prepare for a hearing upon the matter of his competency. Since the proceedings are of statutory origin, there is no jurisdiction to proceed if the requirements of the statutes are not followed.

(3) *There was a failure to comply with Rule Number V governing procedure in probate matters effective July 15, 1914, and the sale was therefore void.*

In Oklahoma the county judge holds the probate court. He is elected for a two-year term. After Oklahoma was admitted as a state the county judges in many cases failed to protect the estates of those under guardianship. To afford additional protection to wards the Supreme Court of Oklahoma on June 11th, 1914, adopted rules of procedure

in probate matters which became effective July 15th, 1914, placing restrictions on the sale and leasing of lands of persons under guardianship. These rules are printed in 47 Oklahoma XIV to XVII.

Rule V provides:

> "Petitions for the sale of land of minors and incompetents will be heard * * * of each * * *. On the hearing of petitions for sale, the guardian, person in custody, and the ward himself, when over fourteen years of age, must be present and must be examined as to the necessity of said sale and the truth of the allegations of the petition, and furnish such additional evidence as the court may require. The evidence offered must be taken down and transcribed and a copy thereof filed with the papers in the case."

The evidence showed the ward was not in court when the petition for sale was heard and that no transcript of the testimony was filed. The order made recites the appearance of the guardian only.

The Supreme Court of Oklahoma has many times passed upon the effect of the failure to comply with Rule IX of said rules of probate procedure and has held that a lease made by a guardian and approved by the probate court is absolutely void where Rule IX has been disregarded.

In *Winona Oil Company* v. *Barnes*, 83 Okl. 248, 200 Pac. 981, it was held:

> "The rule of this court promulgated June 11, 1914 (47 Okl. XIV), relating to procedure of County Courts in probate matters, has the force and effect of law, and is binding upon the court as well as upon the parties to the action and cannot be dispensed with to suit the circumstances in any particular case."

This doctrine was reaffirmed in *Garfield Oil Co.* v. *Crews*, 134 Okl. 229, 273 Pac. 228, which cites many of the earlier cases.

In principle there can be no distinction between Rule IX and Rule V of the same rules governing probate procedure. Rule V is mentioned in *Manuel* v. *Kidd*, 126 Okl. 70, at 78, 258 Pac. 915, where the order made recited the appearance of the minor. Rule V is also mentioned in *Given* v. *Jones*, 158 Okl. 124, at 127, 12 P. (2d) 892, where it was held that the right to attack the sale because of failure to comply with Rule V was barred by the statute of limitations.

(4) ***The guardian's deed was void because the land was in Seminole County, Oklahoma, there was no appraisement of the land and the actual sale was in Hughes County, Oklahoma.***

The applicable statutes are the following portions of sections of Oklahoma Revised Laws of 1910:

> "*6382.* Sales at public auction must be made in the county where the land is situated. * * *"
>
> "*6384.* No sale of real estate at private sale shall be confirmed by the court unless the sum offered is at least ninety per cent of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale."

In this case the order of confirmation recites:

> "That upon the hearing of said return of sale the said purchaser, Robert Keyes, raised his bid to the sum of $675.00, which *said bid is accepted by the court and by the guardian.*"

This shows that the bid which was accepted was made in Hughes County. The Oklahoma Supreme Court has uni-

formly held that where land of a minor is sold without appraisement and the sale is not had at public auction in the county where the land is situated, the guardian's deed is absolutely void.

—*Oklahoma Portland Cement Co.* v. *Winters*, 77 Okl. 36, 186 Pac. 468;
Winters v. *Oklahoma Portland Cement Co.*, 65 Okl. 132, 164 Pac. 965;
Glory v. *Bagby*, 79 Okl. 155, 188 Pac. 881;
Sampson v. *Smith*, 64 Okl. 102, 166 Pac. 422;
Littlehead v. *Shepard*, 123 Okl. 29, 251 Pac. 60;
Pritchett v. *Walters*, 111 Okl. 33, 238 Pac. 487;
Nut-Te-Che Lewis v. *Ward*, 101 Okl. 146, 223 Pac. 839;
Abraham v. *Lozier*, 110 Okl. 221, 237 Pac. 85;
Pritchett v. *Jenkins*, 111 Okl. 30, 238 Pac. 487.

It is true that appellant's petition did not contend that the guardian's sale was void on the 4th ground here argued. But the petition did set out the facts making it void on such ground. Appellant was a person under disability. In *Patterson* v. *Carter*, 83 Okl. 70, at 73, it was said:

> "It must not be forgotten that these restricted Indians do not become *sui juris* on reaching their majority."

In Oklahoma the rule prevails that the court on its own motion should protect the rights of persons who are under disability.

—*In re Sanders' Estate*, 67 Okl. 3, 168 Pac. 197;
Tiuna v. *Willmott, et al.*, 162 Okl. 42.

The evidence that the sale was void on said ground was admitted without objection. It is also the rule in Okla-

homa that in such case the pleadings will be deemed amended to conform to the evidence admitted without objection. —*Harn* v. *Patterson*, 58 Okl. 694, at 707.

Respectfully submitted,

WILLIAM NEFF,
Counsel for Appellant.

APPENDIX.

Provisions of Oklahoma Revised Laws of 1910.

6538. *Petitions for Guardians of Incompetent or Insane Persons.* When it is represented to the County Court upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, the judge must cause notice to be given to the supposed insane or incompetent person, of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced before him on the hearing.

6539. *Guardian Appointed, When.* If after a full hearing and examination upon such petition, it appears to the judge of the County Court that the person in question is incapable of taking care of himself and managing his property, he must appoint a guardian of his person and estate, with the powers and duties in this article (chapter) specified.

6540. *Bond and Powers of Guardian.* Every guardian appointed as provided in the preceding section, has the care and custody of the person of his ward, and the management of all his estate, until such guardian is legally discharged, and he must give bond to such ward, in like manner and with like conditions, as before prescribed with respect to the guardian of a minor.

Sections of Mansfield's Digest of Statutes of Arkansas.

Sec. 3784. The court by which any insane person is committed to guardianship may make orders for the restraint, support and safekeeping of such person; for the management of his estate and the support and maintenance of his family and education of his children out of the proceeds of his estate; to set apart and reserve for the use of such family any property, real or personal, not necessary to be sold for the payment of debts; and to let, sell or mortgage any part of such estate, real or personal, when neces-

sary for the payment of debts, the maintenance of such insane person or his family, or the education of his children.

Sec. 3796. The land of a person of unsound mind may be sold by the order of the probate court, though not necessary for the payment of his debts, or for his maintenance, where it shall appear:

First. That the person of unsound mind has a wife or children.

Second. That this unsoundness of mind is confirmed and incurable.

Third. That his estate is more than sufficient to pay his debts and maintain him.

Fourth. That the sale will be beneficial to his estate, and prospectively beneficial to his wife and children.

Fifth. That his wife and children, being made parties to the proceeding in proper person, if of full age, or by their guardians if infants, consent to such sale as beneficial to them by their answers, sworn to by their guardians.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 142

NOAH STEWART,

Appellant,

vs.

ROBERT KEYES ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

MOTION TO DISMISS.

T. H. WREN,
W. N. STOKES,
A. M. BEETS,
JOHN ROGERS,
JAMES C. DENTON,
RICHARD H. WILLS,
J. H. CROCKER,
I. L. LOCKEWITZ,
J. P. GREVE,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 142

NOAH STEWART,

Appellant,

vs.

ROBERT KEYES ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

MOTION TO DISMISS.

Come now Robert Keyes, T. B. Slick, D. Replogle, William G. Johnston, Echolustee Oil Corporation, Leslie Rogers, Mid-Continent Petroleum Corporation, Cosden Oil & Gas Company, Cosden & Company, National Bank of Commerce of New York City and Phillips Petroleum Company, the appellees herein, and move this Court to dismiss

with costs the appeal taken herein to this Court by the above named appellant, upon the following ground:

That all that the Supreme Court of the State of Oklahoma held and decided in the final judgment appealed from was: That appellant's action, being an action by a full-blood Creek Indian to recover possession of and quiet title to his inherited interest in the allotted lands of a deceased full-blood Creek Indian, was barred by the Statutes of Limitations of the State of Oklahoma long prior to the enactment of Section 2, Chapter 115 of the Act of Congress approved April 12, 1926 (44 Stat. 239), commonly known as the Harreld-Hastings Act; that said Act of Congress was not intended to revive any action which was theretofore subject to and barred by said Oklahoma Statutes of Limitations; and that, therefore, said Act of Congress was not applicable to appellant's action. Therefore, the allowance by the Supreme Court of the State of Oklahoma of this appeal was improvident in that in said final judgment of the Supreme Court of Oklahoma there was not drawn in question the validity of said Act of April 12, 1926, and that the decision was not against its validity, within the meaning and intent of Section 237 (a) of the Judicial Code (43 Stat. 937).

T. H. WREN,
Attorney for Appellee, Robert Keyes.
W. N. STOKES,
Attorney for Appellee, T. B. Slick.
A. M. BEETS,
Attorney for Appellees, D. Replogle, William G. Johnston and Echolustee Oil Corporation.
JOHN ROGERS,
Attorney for Appellee, Leslie Rogers.
JAMES C. DENTON,

RICHARD H. WILLS,
J. H. CROCKER,
I. L. LOCKEWITZ,
J. P. GREVE,
Attorneys for Appellees, Mid-Continent Petroleum Corporation, Cosden Oil & Gas Company, Cosden & Company, National Bank of Commerce of New York City, and Phillips Petroleum Company.

Service of the foregoing Motion to Dismiss Appeal is acknowledged this 23rd day of June, 1934.

WILLIAM NEFF,
Attorney for Appellant.

STATEMENT IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION.

Appellees, in support of their motion to dismiss this appeal, and pursuant to Rule 12 of the United States Supreme Court, file the following statement of the grounds upon which they contend that the Supreme Court of the United States has no jurisdiction upon appeal to review the judgment appealed from herein, to-wit:

All that the Supreme Court of the State of Oklahoma held and decided in the final judgment appealed from was: That appellant's action, being an action by a full-blood Creek Indian to recover possession of and quiet title to his alleged inherited interest in the allotted lands of a deceased full-blood Creek Indian, was barred by the Statutes of Limitations of the State of Oklahoma long prior to the enactment of Section 2, Chapter 115, of the Act of Congress approved April 12, 1926 (44 Stat. 239), commonly known as the Harreld-Hastings Act; that said Act of Congress was not intended to revive any action which was theretofore subject to and barred by said Oklahoma Statutes of Limitations; and that, therefore, said Act of Congress was not applicable to appellant's action.

It is, therefore, obvious that in the said final judgment of the Supreme Court of Oklahoma there was not drawn in question the validity of said Act of April 12, 1926, *and that the decision was not against its validity. All that the Supreme Court of Oklahoma did was to consider and construe the aforesaid Act to the extent only of holding that the same was not applicable to appellant's action. Instead of holding said Act invalid it was assumed that the same was valid.*

The appellant, in his statement in support of the jurisdiction of this Court, cites *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239, and *Bunch* v. *Cole*, 263 U. S. 250, 68 L. Ed. 290, to the effect that a State court holds a State statute valid whenever it enforces the same, and argues therefrom that to hold a statute inapplicable is equivalent to holding it invalid. This is a *non sequitur*.

The validity of a Federal statute is not necessarily drawn in question merely becaues a claim is asserted thereunder nor because the court construed or interpreted the same. Longest v. *Langford*, 274 U. S. 499, 71 L. Ed. 1170; *New Orleans Land Co.* v. *Brott*, 263 U. S. 97, 68 L. Ed. 187; and Cyc. of Fed. Procedure, Vol. 5, Sections 2649, 2650, and cases cited.

In *Longest* v. *Langford, supra*, the question was whether the surviving husband of a deceased Choctaw Indian woman was, under Section 22 of the Act of July 1, 1902, Chap. 1362 (32 Stat. 641), entitled to an estate by the courtesy in and to an allotment made in the name and right of the wife under said Act, and this Court held:

> "A decision of a state court allowing the husband of a deceased Indian woman an estate by the curtesy in her land cannot be reviewed by the Supreme Court of the United States by writ of error under § 237(a) of the Judicial Code, restricting such review to cases where is drawn in question the validity of the statutes of the United States, and the decision is against the validity."

The second paragraph of the syllabus to the case of *New Orleans Land Company* v. *Brott et al., supra*, is as follows:

> "A writ of error will not lie under the Amendment of 1916 to § 237 of the Judicial Code for review by

> the Supreme Court of the United States of a state decision which unduly limited, but did not dispute, the binding effect of an act of Congress."

It will be borne in mind that in this case we are not dealing with the individual allotment of the appellant, but are dealing with his inherited interest in the allotment of his grandmother, Lizzie Toney. If we were dealing with the appellant's own allotment we would be confronted with an entirely different question.

Insofar as the lands involved herein are concerned the appellant was not a "restricted Indian," within the meaning of the Harreld-Hastings Act, nor was the appellant's interest in said lands "restricted," within the meaning of said Act. In fact, insofar as appellant's interest in said lands was concerned, the same was at all times subject to sale and was "free from restrictions". During appellant's minority or incompetency his interest in said lands was subject to sale through the proper probate court, just as the lands of any other minor or incompetent, and upon his majority and restoration to competency the same was subject to sale upon the approval of the county court having jurisdiction to settle the estate of appellant's ancestor, Lizzie Toney. *Dierks et al.* v. *Isaac et al.*, 114 Okla. 158, 244 Pac. 750; *King* v. *Mitchell*, 69 Okla. 207, 171 Pac. 725; *Chupko* v. *Chapman*, 76 Okla. 201, 170 Pac. 259; *King* v. *Shultz*, 72 Okla. 254, 180 Pac. 550; *Seiffert* v. *Jones*, 77 Okla. 204, 186 Pac. 472, 187, Pac. 223; *Stewart* v. *Burrows*, 80 Okla. 23, 193 Pac. 881; *Harjo* v. *Empire Gas & Fuel Co.*, 28 Fed. (2d) 596; *Harris* v. *Bell*, 254 U. S. 103, 65 L. Ed. 159; and Sections 1, 2, 6 and 9 of the Act of Congress of May 27, 1908 (35 Stat. 315).

Prior to the enactment of Section 2, Chapter 115 of the Act of Congress approved April 12, 1926 (44 Stat. 239), the Statutes of Limitations of the State of Oklahoma were

applicable to appellant's cause of action, if any, and by virtue of said Statutes of Limitations said action had become barred long prior, approximately five years, to the enactment of said Act. (See, for applicable Statutes of Limitations, Sections 183, 184 and 1496 of the 1921 Compiled Statutes of Oklahoma.) To the effect that said Statutes of Limitations were applicable, see *Dierks et al.* v. *Isaac et al.*, 114 Okla. 158, 244 Pac. 750; *King* v. *Mitchell*, 69 Okla. 207, 171 Pac. 725; *Chupko* v. *Chapman*, 76 Okla. 201, 170 Pac. 259 (Petition for certiorari denied, 247 U. S. 506, 62 L. Ed. 1240); *King* v. *Schultz*, 72 Okla. 254, 180 Pac. 550; *Seiffert* v. *Jones*, 77 Okla. 204, 186 Pac. 472, 187 Pac. 223; *Stewart* v. *Burrows*, 80 Okla. 23, 193 Pac. 881; *Harjo* v. *Empire Gas & Fuel Co.*, 28 Fed. (2d) 596; *Harris* v. *Bell*, 254 U. S. 103, 65 L. Ed. 159; and Sections 1, 2, 6 and 9 of the Act of Congress of May 27, 1908 (35 Stat. 315). To the effect that the Statutes of Limitations are applicable to a void as well as a voidable guardian's deed, see *Dodson* v. *Middleton et al.*, 38 Okla. 763, 135 Pac. 368; *Tiger* v. *Brown*, 130 Okla. 83, 265 Pac. 124; *Group* v. *Jones*, 44 Okla. 344, 144 Pac. 377; *Fulp* v. *Squires*, 77 Okla. 244, 187 Pac. 921; *Glory* v. *Bagby*, 79 Okla. 155, 188 Pac. 881; *Wray* v. *Howard*, 79 Okla. 223, 192 Pac. 584; *Minnehart* v. *Littlefield*, 94 Okla. 249, 222 Pac. 253; *Sandlin* v. *Barber*, 95 Okla. 112, 218 Pac. 519; *Anicker et al.* v. *Harrison et al.*, 125 Okla. 21, 256 Pac. 39; *Givens* v. *Jones*, 158 Okla. 124, 12 Pac. (2) 892; and *Washington* v. *Bartlett et al.*, 158 Okla. 218, 13 Pac. (2) 132.

The same construction which was placed upon the Harreld-Hastings Act by the final judgment of the Supreme Court of Oklahoma herein was placed upon said Act by the same Court in the following cases: *Tomlin* v. *Roberts et al.*, 126 Okla. 165, 258 Pac. 1041; *Bearhead* v. *American*

Inv. Co., 159 Okla. 84, 10 Pac. (2) 1086; and *Deere* v. *Gypsy Oil Co.*, 160 Okla. 237, 15 Pac. (2) 1086.

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Service of the foregoing Statement is acknowledged this 23d day of June, 1934.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1934.

No. 142

NOAH STEWART, *Appellant,*

vs.

ROBERT KEYES, *ET AL., Appellees.*

ANSWER BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL.

This Brief is supplemental to appellees' statement in support of their motion to dismiss this appeal, and is filed principally for the purpose of answering certain misstatements contained in appellant's Brief opposing appellees' said motion to dismiss, and certain grounds presented for the first time in said Brief.

Appellant, in his statement in support of the jurisdiction of this Court, relies solely upon the first clause of Section 237(a) of the Judicial Code, providing the right of appeal from the final judgment or decree in any suit in the highest court of a state "where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity," and argues that in the final

judgment appealed from the validity of the Act of Congress of April 12, 1926 (44 Stat. 239), was drawn in question, and that the decision was against its validity. However, appellant, in his brief opposing appellees' motion to dismiss, presents for the first time two additional grounds of jurisdiction, to-wit: *(1)* Because the Oklahoma Supreme Court applied the Oklahoma statutes of limitation as against the contention of appellant in such way as to conflict with the Act of Congress of April 12, 1926 (44 Stat. 239); and, *(2)* because, if appellees' motion to dismiss this appeal should be sustained, a writ of *certiorari* should be granted.

I.

Appellees' statement in support of their motion to dismiss covers the single ground of appeal presented in appellant's statement as to the jurisdiction of this Court, and little more need be said with respect thereto.

While appellant in his Brief contends that the Supreme Court of Oklahoma denied the validity of the Act of Congress of April 12, 1926 (44 Stat. 239), "by express words," he further contends that "it is sufficient to confer jurisdiction to review that in substance and effect, or by necessary implication it denied the validity of the statute." Be that as it may, it is sufficient to say that in the final judgment appealed from there was not drawn in question the validity of the aforesaid act, and that the decision was not expressly or by implication against its validity. All that the Supreme Court of Oklahoma did was to consider and construe the aforesaid act to the extent only of holding that the same was not applicable to appellant's action. Instead of holding said act invalid, it was assumed that the same was valid. And

this being true, this Court, under its decisions cited in appellees' statement in support of their motion to dismiss, has no jurisdiction of this appeal.

Insofar as we are advised, the validity of the Act of April 12, 1926 (44 Stat. 239), has never been called in question. On the contrary, it is our understanding that the same has been universally conceded to be valid, as well as a very wholesome piece of legislation.

While the Supreme Court of Oklahoma did say that Congress would not have the power to revive a cause of action which had previously become fully barred by the statutes of limitation, it very clearly and positively held that the above act was not intended to revive any cause of action to which the statutes of limitation were theretofore applicable, and which had theretofore become completely barred thereby. To have held otherwise would most certainly have been contrary to the obvious purpose and intention of said act.

On page 11 of his Brief the appellant cites *New York, ex rel. Bryant*, v. *Zimmerman*, 278 U. S. 63, 73 L. ed. 184; *St. Louis, I. M. & S. R. Co.* v. *Starbird*, 243 U. S. 592, 61 L. ed. 917; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 76 L. ed. 1102; *Ward* v. *Love County*, 253 U. S. 17, 64 L. ed. 751; *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine* v. *Michaux*, 279 U. S. 737, 73 L. ed. 931; and *Bunch* v. *Cole*, 263 U. S. 250, 68 L. ed. 290, in support of his claim that this Court has jurisdiction of this appeal under the first clause of Section 237 (a) of the Judicial Code. However, none of said cases supports said contention. In the *Zimmerman* case the jurisdiction of this Court was sustained under the second clause of Section 237 (a) of the

Judicial Code. In said case the State court applied a State statute as against the specific claim that it was invalid under the Federal Constitution. The application of said statute necessarily amounted to a decision that the same was valid and constitutional. In the case at bar the Court refused to apply the Harreld-Hastings Act because it was inapplicable, and not because it was invalid. The *Starbird* case was decided in 1917, at which time this Court had jurisdiction to review by writ of error any decision of the highest court of a State which denied any title, right, privilege or immunity specially set up or claimed by either party under the laws of the United States. In said case the decision of the State court denied a claim asserted under said laws. In the *Lawrence* case the decision of the State court from which the appeal was taken held a State statute valid as against the claim that it violated the Federal Constitution. Jurisdiction on appeal was sustained under the second clause of Section 237(a) of the Judicial Code. The *Ward* case came to this Court on a writ of *certiorari*, and this Court took jurisdiction by reason of the fact that the State court denied a right claimed under a Federal statute on non-federal grounds which were plainly untenable. The *Michaux* case also came to this Court on a writ of *certiorari*, and jurisdiction was sustained on the ground that a right under an Act of Congress was specifically claimed and denied. The *Bunch* case was decided in 1923, at which time this Court had juisdiction to review by writ of error any decision of the highest Court of a State which denied any right, title, privilege or immunity claimed under the laws of the United States. In said case the State court applied a State statute to defeat and deny a specific claim made un-

der an Act of Congress that a lease covering Indian lands was void.

II.

Appellant in his Brief takes the position for the first time that this Court has jurisdiction of this appeal on the ground that the Oklahoma Supreme Court applied the Oklahoma statutes of limitation in such a way as to be repugnant to and in conflict with the Act of April 12, 1926 (44 Stat. 239). Obviously this is an effort to invoke the second clause of Section 237 (a) of the Judicial Code, providing the right of appeal from the final judgment or decree in any suit in the highest court of a state "where is drawn in question the validity of the statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

There are two reasons why the above claimed jurisdiction ground of appeal is untenable: *(1)* Said ground was not invoked in any of the proceedings herein, being suggested for the first time in appellant's Brief; and, *(2)* in the final judgment appealed from it was not held, either expressly or by necessary inference, that there was any repugnancy between the statutes of limitation of the State of Oklahoma and the Act of April 12, 1926 (44 Stat. 239), and neither the validity nor the invalidity of said Act of Congress or of the statutes of limitation of the State of Oklahoma was raised or decided.

In Cyc. of Fed. Proc., Vol. 5, Sec. 2649, it is said:

"* * * The validity of a federal statute or treaty is not necessarily drawn in question merely because a

claim is asserted thereunder, *nor is the invalidity of a state law drawn in question by the mere assertion of some supposed federal right or claim contrary thereto or inconsistent therewith.* The validity of a federal statute, *or the invalidity of a state statute on federal grounds, is not drawn in question in a decision which involves only the construction or interpretation of the statute.* • • •"

In support of the italicized portions of the above quotation the following cases are cited:

United States, ex rel. Champion Lumber Co., v. *Fisher*, 227 U. S. 455, 57 L. ed. 591, 33 Sup. Ct. 329;

Los Angeles Farming & Milling Co. v. *City of Los Angeles*, 217 U. S. 217, 54 L. ed. 736, 30 Sup. Ct. 432;

North Shore Boom & Driving Co. v. *Nicomen Boom Co.*, 212 U. S. 406, 53 L. ed. 574, 29 Sup. Ct. 355;

Columbia Water-Power Co. v. *Columbia Electric Street Railway L. & P. Co.*, 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. 247;

Murdock v. *Memphis*, 20 Wall. 590, 22 L. ed. 429;

Michigan Cent. R. Co. v. *Michigan Southern R. Co.*, 19 How. 378, 15 L. ed. 689;

Los Angeles Farming & Milling Co. v. *City of Los Angeles*, 217 U. S. 217, 54 L. ed. 736, 30 Sup. Ct. 432;

Louisville - N. R. Co. v. *City of Louisville*, 166 U. S. 709, 41 L. ed. 1173, 17 Sup. Ct. 725;

Snell v. *Chicago*, 152 U. S. 191, 38 L. ed. 408, 14 Sup. Ct. 489;

Ferry v. *King County*, 141 U. S. 668, 35 L. ed. 895, 12 Sup. Ct. 128;

Commercial Bank of Cincinnati v. *Buckingham's Ex'rs*, 5 How. 317, 12 L. ed. 169.

See to the same effect:

Longest v. *Langford*, 274 U. S. 499, 71 L. ed. 1170;
New Orleans Land Co. v. *Brott*, 263 U. S. 97, 68 L. ed. 187.

On page 15 of his Brief appellant cites *Bunch* v. *Cole*, 263 U. S. 250, 68 L. ed. 290; *New York, ex rel. Bryant*, v. *Zimmerman*, 278 U. S. 63, 73 L. ed. 184; *Independent School District of Ackley* v. *Hall*, 106 U. S. (16 Otto) 428, 27 L. ed. 237; *Old Nick Williams Co.* v. *United States*, 251 U. S. 541, 54 L. ed. 318; *Lamb* v. *Cramer*, 285 U. S. 217, 76 L. ed. 715; *World's Columbian Exposition Co.* v. *Republic of France*, 91 Fed. 64; *Green* v. *United States*, 19 F. (2d) 850, and *In re T. E. Hill Co.*, 148 Fed. 832, in support of his claim that this Court has jurisdiction of this appeal under the second clause of Section 237(a) of the Judicial Code. However, only two of said cases, to-wit, the *Zimmerman* and *Bunch* cases, involved the jurisdiction of this Court on appeal. The remainder of said cases involved the necessity for assignment of errors on appeal. In the *Zimmerman* case the State court applied a State statute against a specific claim that it was invalid under the Federal Constitution. The *Bunch* case was decided in 1923, at which time this Court had jurisdiction to review by writ of error any decision of the highest court of a State which denied any right, title, privilege or immunity claimed under the laws of the United States. In said case the State court applied a State statute to defeat and deny a specific claim made under an Act of Congress that a lease covering Indian lands was void. It

was not held in said case that the application of the State statute gave this Court jurisdiction to review by writ of error, but the holding was that the denial of the specific claim made under the Act of Congress was sufficient, under the law as it then existed, to confer jurisdiction upon this Court.

III.

Appellant in his Brief suggests for the first time that if appellees' motion to dismiss should be sustained he should be granted a writ of *certiorari*. We insist, however, that there exists no reason for granting a writ of *certiorari* in this case. An examination of Section 237(b) of the Judicial Code, and of Rule 38 of this Court, pertaining to writs of *certiorari*, discloses nothing to justify the granting of such writ.

Appellant suggests that the Supreme Court of Oklahoma in this case has decided a federal question not in accord with the applicable decisions of this Court, and contrary to the right of Congress to legislate concerning the inherited lands of full-blood Indians. However, there is no basis for these claims. Appellant cites no decision of this Court with which the decision of the Supreme Court of Oklahoma conflicts. On the contrary, the decision of the Supreme Court of Oklahoma and the authorities cited therein are in harmony with the decisions of this Court, and with the right of Congress to legislate concerning inherited lands of full-blood Indians. In fact, some of the authorities relied on by the Supreme Court of Oklahoma, if not most of them, are based upon decisions of this Court.

Appellant further suggests that there are many cases which will be affected by the decision from which he has appealed. This, however, is very improbable. The Act of April 12, 1926 (44 Stat. 239), became effective on April 12, 1926, and the restricted Indians referred to therein were given until at least April 12, 1928, to sue. Now, more than six years have transpired since the latter date, and in all probability all cases involving the identical question decided by the Supreme Court of Oklahoma herein have been finally disposed of. In appellees' statement in support of their motion to dismiss this appeal they cite three cases in which the Supreme Court decided prior to this case the identical question decided herein. Moreover, it is highly probable that if this Court were to take jurisdiction of this case and decide the same contrary to the Supreme Court of Oklahoma, the effect thereof would be to open the floodgates to litigation, which the Act of April 12, 1926 (44 Stat. 239), was designed to close.

Appellant in his Brief undertakes to create the impression that this case involves an alienation of Indian lands contrary to the Acts of Congress. This is sought in this way: It is argued that under the decisions of the Supreme Court of Oklahoma the statutes of limitations of that state operate to transfer title to land, and that when applied to Indian lands the result is to sustain an alienation contrary to the Acts of Congress. But, whatever may be the effect of the Oklahoma statutes of limitations in this respect, it will be borne in mind that the title of the appellees is predicated upon a guardian's deed which was duly and regularly ap-

proved by the proper probate court, in accord with Sections 1, 2, 6 and 9 of the Act of May 27, 1908 (35 Stat. 312). See, also, *Harris* v. *Bell*, 254 U. S. 103, 65 L. ed. 159.

The attack made by the appellant upon appellees' title was not that his interest in the lands involved was not alienable, in the very manner in which it was alienated, but that the appointment of his guardian was invalid. Therefore, the following language by the Eighth Circuit Court of Appeals in the case of *Harjo* v. *Empire Gas & Fuel Co.*, 28 F. (2d) 596, is particularly applicable:

> "The deed being approved, as provided by law, the Indians as to the question of setting the same aside on the ground of fraud were in no different position than a white person would be, and *the right to attack the deed for fraud could be lost by laches or the statute of limitations. Schrimpscher* v. *Stockton*, 183 U. S. 290, 22 S. Ct. 107, 46 L. ed. 203; *Felix* v. *Patrick*, 145 U. S. 317, 12 S. Ct. 862, 36 L. ed. 719. *This is not a situation where a transfer of Indian lands is void because of violation of government restrictions.* Hence it does not present an attempt to circumvent the federal statutes by divesting title by a stipulation in court. We see no reason why the claim of the Indians in the District Court of Seminole County that the deed had been secured by fraud could not be settled and waived by the attorneys for the government authoritatively representing said Indians in the litigation."

Appellant contends that he is a "restricted Indian" and that the lands involved were "restricted lands" within the meaning of the Act of April 12, 1926 (44 Stat. 239), but that such is not the case is borne out by the authorities set out in appellees' statement in support of their motion to dismiss this appeal.

Section 9 of the Act of May 27, 1908 (35 Stat. 312), in part, reads as follows:

> "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land."

By virtue of the foregoing, the lands involved, appellant's interest therein, and appellant became unrestricted, and appellant being an incompetent person, his said interest in said lands was subject to sale by his guardian through the County Court of Hughes County, Oklahoma. See Section 2 of the Act of April 28, 1904 (33 Stat. 573); Sections 1, 2, and 6 of the Act of May 27, 1908 (35 Stat. 312); and *Harris* v. *Bell*, 254 U. S. 103, 65 L. ed. 159.

In the case of *Lytle* v. *Fulotka*, 106 Okl. 86, 233 Pac. 456, the Court said:

> "The probate courts of the State of Oklahoma have jurisdiction to sell the inherited lands of incompetent adult full-blood Indians of the Five Civilized Tribes. It is contended that section 6 of the Act of May 27, 1908 (35 Stat. 315), grants jurisdiction to probate courts of the State of Oklahoma only in the case of minor allottees. Said section is limited by its terms to minors and minor allottees, but the probate courts of this state and former Indian Territory have habitually exercised probate jurisdiction, not only over the estates of minor allottees, but of minor heirs as well. *Yarhola* v. *Strough*, 64 Okl. 195, 166 P. 729. Section 6 of such act is not the source of jurisdiction of the probate courts of the State of Oklahoma over the estates of Indian minors. It is merely declaratory of the law as it had existed since the passage of the Act of April 28, 1904 (chapter 1824, 33 Stat. 573), if not before. By that act it was provided:
>
> 'And full and complete jurisdiction is hereby

> conferred upon the District Courts in said territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indian, freedmen or otherwise.'

"Thus, full probate jurisdiction was granted to the District Courts of Indian Territory over the estates of decedents, minors, and incompetents, 'whether Indian, freedmen or otherwise.' *Morrison* v. *Burnette*, 154 F. 617, 83 C. C. A. 391; *Jennings* v. *Wood*, 192 F. 507, 112 C. C. A. 657; *Robinson* v. *Long Gas Co.*, 221 F. 398, 136 C. C. A. 642; *Cowles* v. *Lee*, 35 Okl. 159, 128 P. 688; *Wellsville Oil Co.* v. *Miller*, 44 Okl. 493, 145 P. 344.

"Upon the admission of the state into the Union, this jurisdiction was, by virtue of the constitution and enabling act, conferred upon the probate courts of the state. Congress recognized the jurisdiction of the probate courts over the estates of incompetents by section 2 of the Act of May 27, 1908, when, in providing for the leasing of restricted lands for oil and gas, it added this proviso:

> 'And provided further that the jurisdiction of the probate courts of the State of Oklahoma, over lands of minors and incompetents shall be subject to the foregoing provisions'."

On pages 23 and 24 of his Brief, appellant cites *Sperry Oil & Gas Co.* v. *Chisholm*, 264 U. S. 488, 68 L. ed. 803; *Marchie Tiger* v. *Western Invest. Co.*, 221 U. S. 286, 55 L. ed. 738; *Parker* v. *Richard*, 250 U. S. 235, 63 L. ed. 954; *Brader* v. *James*, 246 U. S. 88, 62 L. ed. 591; *Talley* v. *Burgess*, 246 U. S. 104, 62 L. ed. 600; *Kiker* v. *United States*, 63 F. (2d) 957; *Conner* v. *Cornell*, 32 F. (2d) 581; and *Bunch* v. *Cole*, 263 U. S. 250, 68 L. ed. 290, in support of his contention that his inherited interest in lands involved herein were "restricted," and that he is, with respect to his said

interest in said lands, a "restricted" Indian, within the meaning of the Act of April 12, 1926 (44 Stat. 239). However, in none of said cited cases, except the *Kiker* and *Conner* cases, was there involved any conveyance which was made by a full-blood Indian, or his guardian, and approved by any probate court, or the judge thereof, subsequent to the Act of May 27, 1908 (35 Stat. 312), of his inherited interest in the allotment of a deceased Indian. Just why the *Kiker* case is cited we are at a loss to understand. True, that case involved an approved conveyance of a full-blood Indian of his inherited interest in the allotment of a deceased Indian, but there is nothing said or decided therein which throws any light at all upon the instant contention. And the *Conner* case, decided April 19, 1929 *(certiorari* denied, 280 U. S. 583), is a positive authority against appellant's contention. In that case the Eighth Circuit Court of Appeals applied the law of estoppel by a judgment of dismissal to an attempted attack upon an approved conveyance made by certain full-blood Indians after the Act of May 27, 1908 (35 Stat. 312), of their inherited interests in the allotment of a deceased Indian. Furthermore, it is noteworthy that in *Harjo* v. *Empire Gas & Fuel Co.*, 28 F. (2d) 596, decided September 21, 1928, the same Court specifically held that the statutes of limitation were applicable to such a conveyance as is involved herein. In none of the cases cited on pages 23 and 24 of appellant's Brief was any question with respect to the statutes of limitation involved.

Since the Act of May 27, 1908 (35 Stat. 312), the status of allotments of living Indian minors of less than one-half blood, to say nothing of numerous other allotments, or parts of allotments, and the status of allotments of deceased In-

dians, in the hands of full-blood Indian heirs, who happened to be mentally incompetent, have been practically identical, and no one would contend for a minute that since said Act the Indians in the class first referred to, or their allotments, were "restricted." Since said Act, by virtue of the provisions thereof, thousands upon thousands of the allotments of minors of less than one-half blood have been sold through the probate courts of Oklahoma, and the Supreme Court of Oklahoma in hundreds of cases has consistently applied the statutes of limitation to such sales. But if the contention of the appellant were sustained, the inevitable result would be that prior to the Act of April 12, 1926 (44 Stat. 239), the statutes of limitation of the State of Oklahoma were never applicable to probate sales of allotments of minor Indians of less than one-half blood, and that by virtue of said Act such allottees were given until at least April 12, 1928, to attack such probate sales, although thousands of them were made shortly after July 27, 1908. Thus the Act of April 12, 1926 (44 Stat. 239), would operate to open wide, instead of close, the flood-gates of litigation—certainly a most incongruous result.

The sole ground upon which appellant attacked the guardian's sale herein was that the appointment of his guardian was void under the Oklahoma law. However, in the case of *Mullen* v. *Glass, et al.*, 43 Okl. 549, 143 Pac. 679, decided October 13, 1914, prior to the appointment of John A. Jacobs as guardian of appellant, the Supreme Court of Oklahoma held that such an appointment was good and valid.

Appellant argues that there is a conflict in the Oklahoma Supreme Court decisions with respect to the application of the Oklahoma statutes of limitation to a case like the one at bar, and that prior to the enactment of the Act of April 12, 1926 (44 Stat. 239), said Court uniformly held that said statutes were not applicable, but that since the enactment of said Act it has held otherwise, citing on pages 25 and 26 of his Brief numerous cases in support of the contention. However, except as to the case of *Lytle* v. *Fulotka*, 102 Okl. 86, 233 Pac. 456, in which the opinion was written by a Supreme Court Commissioner, none of the cases cited holds that the statutes of limitation were not applicable to a case like the one at bar. These cases either involved transactions prior to the effective date of the Act of May 27, 1908 (35 Stat. 312), or conveyances in contravention of Acts of Congress, or where no conveyance at all was involved and it was claimed that adverse possession alone precluded the Indian from suing. We, therefore, assert that there is not, and never has been, any conflict in the decisions of the Supreme Court of Oklahoma upon any question involved herein.

In the case of *Dierks, et al.*, v. *Isaac, et al.*, 114 Okl. 158, 244 Pac. 750, the Supreme Court of Oklahoma, in an opinion by Mr. Justice PHELPS, distinguished, if it did not overrule, *Lytle* v. *Fulotka, supra.* In any event, the subsequent Oklahoma decisions cited in appellees' statement in support of their motion to dismiss this appeal are contrary to *Lytle* v. *Fulotka, supra,* and in at least one of said cases, *Chupco* v. *Chapman*, 76 Okl. 201, 170 Pac. 259, this Court, in 247 U. S. 506, 62 L. ed. 1240, denied a petition for *certiorari.*

In view of the foregoing, and what is contained in our motion to dismiss and the statement in support thereof, this appeal, we think, should be dismissed and *certiorari* denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1934.

No. 142

NOAH STEWART, *Appellant,*

vs.

ROBERT KEYES, *ET AL., Appellees.*

On Appeal From the Supreme Court of Oklahoma.

BRIEF *for* APPELLEES.

Statement.

This action was commenced by appellant in the District Court of Seminole County, Oklahoma, to recover possession of his alleged undivided interest in the lands involved herein and to quiet title thereto. At the conclusion of the trial in said court the appellees interposed a demurrer to appellant's evidence, and the same was sustained. Thereafter an appeal was taken to the Supreme Court of Oklahoma, and it affirmed the judgment of the trial court. Thereafter appellant appealed to this court.

Motion to Dismiss Appeal.

Appellees filed herein a motion to dismiss this appeal, which they believe should be sustained. Appellees also believe that there is no reason for granting *certiorari* herein. We respectfully invite the court's attention to the aforesaid motion to dismiss and the answer brief in support thereof.

Facts to Be Considered.

At the commencement of the trial in the District Court of Seminole County, Oklahoma, it was stipulated by the parties as follows:

That Lizzie Toney was a full-blood Creek Indian, enrolled opposite Roll No. 8540; that she died intestate in the month of October, 1899; that the lands involved herein were allotted and patented to the heirs of said Lizzie Toney; that the certificate of selection of the allotment was issued January 13, 1902; that the descent of the aforesaid allotment was cast under the Creek law; and that appellant, Noah Stewart, a full-blood Creek, enrolled opposite Roll No. 4478, was a grandson of Lizzie Toney and one of her heirs at law (R. 17, 18).

Appellant's "Exhibit 27" was a certified copy of the complete Enrollment Records in connection with his enrollment as a citizen of the Creek Nation, and the same discloses that he was seven years of age on January 23, 1900, the date of the enrollment (R. 18A, 18B, 18C).

The parties stipulated that the Secretary of the Interior had never made any order removing any restrictions with reference to appellant or the lands involved herein,

but in entering into said stipulation, appellees stated that this was wholly immaterial (R. 19).

The Supreme Court of Oklahoma stated the facts as follows:

> "This is an appeal from a judgment rendered by the District Court of Seminole County in favor of the defendants in error, who were the defendants in the trial court, against the plaintiff in error, who was the plaintiff therein. Hereinafter the parties will be referred to as they appeared in the trial court.
>
> "The plaintiff's original petition was filed on April 11, 1928. The cause of action attempted to be stated therein was based on the allegations *that the appointment of John A. Jacobs as guardian for him was invalid, that the continuation of such guardianship after the plaintiff had reached the age of majority was invalid,* and that the sale of the land in question by the guardian was invalid. Thereafter various amendments were filed.
>
> "Since the controlling issue is whether or not that guardian's deed can be attacked herein, the details of the allegations of the petition and amendments are not stated.
>
> "The record shows that on July 20, 1909, John A. Jacobs was *regularly appointed* guardian of the property of the plaintiff, who, at the time of the appointment, was a minor. It shows that on the 5th day of January, 1914, after the plaintiff had arrived at the age of majority, said John A. Jacobs presented to the county court a resignation as guardian; that the county court found that the plaintiff, a full-blood Indian and of a weak and inferior mind, was unable to properly transact his own business and incompetent to manage his own affairs; that the said John A. Jacobs was a capable person to be continued as guardian of the plaintiff; that, after an examination of the plaintiff, and after a hearing in the presence of the plaintiff, the resigna-

tion of the guardian was not accepted, and it was ordered that the guardianship continue with John A. Jacobs as guardian until the further order of the court. The record does not show the character of notice of that hearing, if any, and it might be presumed that the necessary notice was given before the order was made. However, we are not determining that question herein. The record shows that thereafter the land in question was sold at a guardian's sale and purchased by the defendant Robert Keyes, who entered into possession thereof and who remained in possession thereof at all times thereafter, and under whom the other defendants in this action claimed title to their respective interests in the property in question. That guardian's deed was filed for record on the 12th day of July, 1916. On August 4, 1917, the county court made an order adjudging the plaintiff to be competent and discharging the guardian. There was other evidence pertaining to *other issues* not controlling herein.

"At the conclusion of the evidence on behalf of the plaintiff, the defendants, jointly and severally, demurred thereto on the ground, *among others*, that each and every cause of action asserted by the plaintiff in the case, as shown by the evidence, was barred by the statutes of limitation of the State of Oklahoma and the United States of America. That demurrer was sustained by the trial court, and judgment was rendered dismissing the action with prejudice. From that judgment the plaintiff appealed to this court." (R. 2, 3, italics ours.)

Other Questions Not Decided by the Supreme Court of Oklahoma.

Appellees in the Supreme Court of Oklahoma urged a number of grounds for affirming the judgment of the trial court, in addition to the one decided by the Supreme Court. (See Separate Answer and Cross Petition, R. 6-17, and Opinion of Supreme Court, (R. 2.) Therefore, in the event of an adverse decision by this court, all questions which were not decided by the Supreme Court of Oklahoma will doubtless be reserved for decision by said court.

Laws to Be Considered.

For the convenience of the court, we are setting out in the Appendix hereto the applicable laws pertaining to the selection, allotment and alienation of lands in the Creek Nation, the applicable laws relating to the jurisdiction of the probate courts in the Indian Territory and the State of Oklahoma, the applicable Oklahoma statutes of limitation, and section 2 of the Act of April 12, 1926 (44 Stat. 239).

ARGUMENT and AUTHORITIES.

Appellees contend that the opinion and judgment of the Supreme Court of Oklahoma herein should be affirmed for the following reasons, to-wit:

1. *That since the Act of May 27, 1908 (35 Stat. 312), the inherited lands of a minor or incompetent full-blood Creek Indian have been subject to sale by the guardian of such Indian, through the County Court appointing such guardian, irrespective of the County Court having jurisdiction to settle the estate of the Indian from whom said lands were inherited. Therefore, the County Court of Hughes County, Oklahoma, being the court which appointed John A. Jacobs as guardian of appellant, Noah Stewart, had the power and authority to authorize the sale of appellant's interest in the lands involved herein and to approve the guardian's deed made by such guardian on the 11th day of July, 1916.*

2. *That the guardian's deed which was executed by John A. Jacobs, as guardian of appellant, an incompetent, to the appellee, Robert Keyes, on the 11th day of July, 1916, was and is valid.*

3. *That whether or not the lands involved herein were "restricted", in the hands of appellant, or whether or not he, with respect to said lands, was a "restricted" Indian, the deed which was made by his guardian, John A. Jacobs, on the 11th day of July, 1916, and approved by the County Court of Hughes County, Oklahoma, was subject to the statutes of limitation of the State of Oklahoma, and said statutes had fully run long prior to the Act of April 12, 1926 (44 Stat. 239).*

4. *That the Act of April 12, 1926 (44 Stat. 239), was not applicable to appellant's cause of action attacking the above guardian's deed for the following reasons:* (a) *Appellant was not a "restricted" Indian, nor was his interest in the lands involved herein "restricted", within the meaning and purview of said act; and,* (b) *said act was not intended to apply to a cause of action to which the statutes of limitation of the State of Oklahoma were therefore applicable, and had fully run long prior to the enactment of said act.*

We will now undertake to develop the foregoing contentions, in the order above set out, after which we will undertake to explain and criticize the argument and authorities of appellant.

I.

Since the Act of May 27, 1908 (35 Stat. 312), the inherited lands of a minor or incompetent full-blood Creek Indian have been subject to sale by the guardian of such Indian, through the County Court appointing such guardian, irrespective of the County Court having jurisdiction to settle the estate of the Indian from whom said lands were inherited. Therefore, the County Court of Hughes County, Oklahoma, being the court which appointed John A. Jacobs as guardian of appellant, Noah Stewart, had the power and authority to authorize the sale of appellant's interest in the lands involved herein and to approve the guardian's deed made by such guardian on the 11th day of July, 1916.

We have set out in the Appendix hereto certain laws relating to allotment and alienation of lands of the Five Civilized Tribes, and it will be seen therefrom that Congress at all times presupposed the jurisdiction of the probate

courts in the Indian Territory and the State of Oklahoma to appoint guardians for minors and incompetent Indians, and that such Indians, in matters pertaining to the selection, allotment and alienation of their lands, should act by and through such guardians. This is particularly manifested by section 2 of the Act of May 27, 1908 (35 Stat. 312). And since the admission of Oklahoma to statehood the County Courts thereof have had jurisdiction and power to appoint guardians for minors and incompetents and to authorize and approve sales and conveyances of their real estate. (See article 1, chapter 8; articles 1, 4 and 6 of chapter 9; and article 13 of the Oklahoma Statutes, 1931.)

We do not understand appellant to seriously claim that since the Act of May 27, 1908 (35 Stat. 312), the County Court of Hughes County, Oklahoma, did not have general jurisdiction to appoint a guardian for appellant, upon the ground that he was mentally incompetent, or, having made such appointment, to authorize and approve the sale of appellant's interest in the lands involved herein. His contention, if we understand it, is principally that, due to certain irregularities, the appointment which was made and the sale which was authorized and approved were invalid. In any event, the decision of this court in the case of *Harris, et al.*, v. *Bell, et al.*, 254 U. S. 103, 65 L. ed. 159, conclusively establishes that the County Court of Hughes County, Oklahoma, did have general jurisdiction to appoint a guardian for appellant, upon the ground that he was an incompetent, and to authorize and approve the sale by said guardian of appellant's interest in the lands involved herein, irrespective of the County Court having jurisdiction to settle the estate of appellant's grandmother, from whom he inherited

such interest. The fifth paragraph of the syllabus to that case is as follows:

"Adult heirs only must be regarded as comprehended by the proviso in the Act of May 27, 1908, section 9, that no conveyance of any interest of any full-blood Indian heir shall be valid unless approved by the court having jurisdiction of the settlement of the estate of a deceased allottee, in view of the provision of section 6 of such act, subjecting the persons and property of minor Indians to the jurisdiction of the Oklahoma probate courts, and hence a guardian's conveyance for minor heirs of a deceased allottee, directed and approved by the court having control of the guardianship, need not also be approved by the court having jurisdiction of the deceased allottee's estate."

In the course of the opinion in said case this court said:

"Of course, the purpose in requiring any approval is to safeguard the interests of the full-blood Indian heir. Where he is a minor, he can convey only through a guardian; and no court is in a better situation to appreciate and safeguard his interests than the one wherein the guardianship is pending. Besides, as a general rule, a guardianship carries with it exclusive power to direct the guardianship and to supervise the management and disposal of the ward's property. It is so in Oklahoma. This rule is so widely recognized and so well grounded in reason that a purpose to depart from it ought not to be assumed unless manifested by some very clear or explicit provision. The Act of 1908 contains no manifestation of such a purpose outside the proviso in section 9. That proviso seems broad, but so is the provision in section 6, subjecting the persons and property of minor Indians to local guardianship. As both are in the same act, they evidently were intended to operate harmoniously, and should be construed accordingly. The proviso does not mention minors under guardianship; and to regard its general words

as including them will either take all supervision of the sale of their interest in inherited lands from the court in which the guardianship is pending, or subject that court's action to the approval of another court of the same rank. In either event, conflict and confusion will almost certainly ensue and be detrimental to the minor heirs. *But, if the proviso be regarded, as well it may, as referring to heirs not under guardianship—in other words, to adult heirs—the two provisions will operate in entire harmony,* and all full-blood heirs will receive the measure of protection intended. We think this is the true construction." (Italics ours.)

The foregoing is equally applicable to a full-blood heir who happens to be *non compos mentis,* and thus we are safe in saying that both minor and mentally incompetent full-blood heirs, with respect to their inherited lands, are in the same category as Indian minors of less than half blood, with respect to their allotted lands.

Aside from the foregoing there are only two positions that can be taken, either *(1)* that a full-blood incompetent heir can, without any guardian being appointed, execute a deed to his inherited lands and have the same approved in accordance with the proviso in section 9 of the Act of May 27, 1908 (35 Stat. 312), or *(2)* such Indian cannot in any way dispose of his inherited lands, there being no specific provision therefor. But each of these alternatives is too unreasonable to justify the thought of any court adopting it.

Even in the absence of any provision as to how a mentally incompetent full-blood heir could sell his inherited lands, this court, inasmuch as section 9 of the Act of May 27, 1908 (35 Stat. 312), removed all restrictions therefrom, would hold that the same were alienable according to the state laws re-

lating to incompetents. For, in *Kendall* v. *Ewert*, 259 U. S. 139, 66 L. ed. 862, this court held:

> "There being no congessional legislation providing for the administration of the personal property of an intestate Indian, the state law is applicable."

In the case of *Lytle* v. *Fulotka*, 106 Okl. 86, 233 Pac. 456, in an opinion by a Supreme Court Commissioner, it was specifically held that subsequent to the Act of May 27, 1908 (35 Stat. 312), the probate courts of Oklahoma had jurisdiction to appoint guardians for incompetent adult full-blood Indians and to approve sales of their inherited lands.

Now, having reached the conclusion that a guardian may be appointed for a full-blood incompetent heir and that such guardian may sell the inherited lands of such heir, through the County Court appointing him, all in accordance with the laws of the State of Oklahoma, irrespective of the County Court having jurisdiction to settle the estate of the Indian from whom such heir inherited said lands, it necessarily follows that this court will follow the construction which the Supreme Court of Oklahoma has placed upon its statutes dealing with the appointment of guardians for incompetents and the sale of the lands of such incompetents, together with the effect of such proceedings. That this is true was established by this court in the case of *Bunch* v. *Cole, et al.*, 263 U. S. 250, 68 L. ed. 290, in which it was held:

> "The Supreme Court of the United States will, in dealing with the effect of a state statute, treat it as being intended to operate as the highest court of the state had construed it."

Likewise, in the case of *Joines* v. *Patterson, et al.*, 274 U. S. 544, 71 L. ed. 1194, this court held:

> "The extension over Indian Territory of the laws of Arkansas carried the settled constructions placed upon them by the courts of that state, and as so construed they have become in effect laws of the United States."

II.

The guardian's deed which was executed by John A. Jacobs, as guardian of appellant, an incompetent, to the appellee, Robert Keyes, on the 11th day of July, 1916, was and is valid.

The opinion of the Supreme Court of Oklahoma clearly discloses that the sole ground upon which appellant contended that the guardian's sale and deed involved herein were void was that, although John A. Jacobs was "regularly appointed guardian" of appellant, as a minor, the continuation of such guardian after appellant "had reached the age of majority was invalid" (R. 2).

The only case we have been able to find that involves this identical question is that of *Mullen* v. *Glass, et al.*, 43 Okl. 549, 143 Pac. 679, which is a practically identical case, and it was there held that such appointment was valid. The first paragraph of the syllabus to that case is as follows:

> "The guardianship of a minor incompetent does not terminate by operation of law upon such minor attaining majority. Section 3339, Rev. Laws 1910."

The foregoing case was decided on the 13th day of October, 1914, and, insofar as we have been able to ascertain, it has never been, either directly or indirectly, modified or

overruled, and we, therefore, reiterate that it is conclusive of the proposition that the County Court of Hughes County, Oklahoma, had jurisdiction, power and authority to continue John A. Jacobs as guardian of appellant, although he had arrived at the age of majority, on the ground and for the reason that he was an incompetent, that is, mentally incompetent.

As stated under the preceding proposition, this court will follow the construction which the Supreme Court of Oklahoma has placed upon its statutes dealing with the appointment of guardians for minors and incompetents and the sale of their lands, together with the effect of such proceedings.

In the case of *Bunch* v. *Cole, et al.*, 263 U. S. 250, 68 L. ed. 290, it was held:

> "The Supreme Court of the United States will, in dealing with the effect of a state statute, treat it as being intended to operate as the highest court of the state had construed it."

Likewise, in the case of *Joines* v. *Patterson, et al.*, 274 U. S. 544, 71 L. ed. 1194, this court held:

> "The extension over Indian Territory of the laws of Arkansas carried the settled constructions placed upon them by the courts of that state, and as so construed they have become in effect laws of the United States."

Whatever this court, or anyone else, may now think about the case of *Mullen* v. *Glass, et al., supra*, there can be no question that appellees, inasmuch as they purchased their respective interests in the lands involved herein subsequent to the decision in said case, had a perfect right to rely thereon and can now invoke the same as a rule of property. That

this is true is clear from the somewhat recent case of *Harness* v. *Myers*, 143 Okl. 147, 288 Pac. 285, in which it was held:

"The true rule is to give a change of judicial construction, in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive."

In the course of the opinion in said case the court said:

"In the case of *Douglass* v. *Pike County*, 101 U. S. 677, 687, 25 L. ed. 968, Mr. Chief Justice WAITE, speaking for the Supreme Court of the United States, said: '* * * The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.'

"We hold that since the appointment of the guardian was in compliance with the statute, at the time it was made, the fact that at a later date this court gave a different construction to the statute could not affect rights acquired by the purchaser at the guardian's sale, and that all rights accruing to the parties under the law as it existed previous to the subsequent construction of the statute by this court in this case on its former appeal, cannot be disturbed. In other words, the construction placed by the court on the statute is not retroactive, but prospective, and, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of legislative enactment.

"Since the sale was made and the guardian was appointed in accordance with the law, as it existed at the time the sale was made and the guardian was appointed, the plaintiff cannot recover herein on the ground that the appointment of the guardian was void."

To the same effect see the following Oklahoma cases: *Sarber* v. *Marland Oil Co.*, 147 Okl. 257, 296 Pac. 473; and *Weston* v. *Poland*, 48 F. (2d) 738.

In the case of *Truskett, et al.*, v. *Closser*, 236 U. S. 223, 59 L. ed. 549, involving a similar situation, it was said:

"The construction has become a rule of property in the state, and we should be disposed to accept it as such, even if we had doubts of the construction of the Act of May 27, 1908. *Reynolds* v. *Fewell*, 236 U. S. 58, *ante*, 465, 35 Sup. Ct. Rep. 230."

III.

Whether or not the lands involved herein were "restricted," in the hands of appellant, or whether or not he, with respect to said lands, was a "restricted" Indian, the deed which was made by his guardian, John A. Jacobs, on the 11th day of July, 1916, and approved by the County Court of Hughes County, Oklahoma, was subject to the statutes of limitations of the State of Oklahoma, and said statutes had fully run long prior to the Act of April 12, 1926 (44 Stat. 239).

The record herein discloses that John A. Jacobs, as guardian of the appellant, as an incompetent, on the 11th day of July, 1916, made, executed, acknowledged and delivered to appellee, Robert Keyes, his guardian's deed covering appellant's interest in the lands involved herein, and said deed was filed for record and recorded in the office of

the County Clerk of Seminole County, Oklahoma, on the 12th day of July, 1916. That immediately upon the execution of said deed Robert Keyes went into possession of said lands, and that he and those claiming under him have remained continuously in possession thereof thereafter. That on the 4th day of August, 1917, the County Court of Hughes County, Oklahoma, adjudged appellant to be competent and discharged his guardian. That the case at bar was commenced on the 11th day of April, 1928. And that at the time of the commencement of said action appellant, according to the Enrollment Records, was more than thirty-four years of age (R. 2, 3, 18B).

Applying the Oklahoma statutes of limitations referred to in the opinion of the Supreme Court of Oklahoma (R. 3) to the above facts, there is no escape from the conclusion that appellant's action attacking the above described guardian's deed was barred approximately seven years prior to the commencement thereof, or approximately five years prior to the Act of April 12, 1926 (44 Stat. 239).

There are three lines of authorities which support the instant contention, to-wit:

(1) The federal cases holding that, irrespective of the Act of April 12, 1926 (44 Stat. 239), the Oklahoma statutes of limitations run against the approved deed of a full-blood Indian heir, not under guardianship, covering the inherited lands of such heir;

(2) The cases holding that, irrespective of the Act of April 12, 1926 (44 Stat. 239), the Oklahoma statutes of limitations run against the sale of the inherited lands of a full-blood Indian heir, under guardianship, by the guardian of such heir, through the County Court appointing the guardian;

(3) The cases, both federal and state, holding that, irrespective of the Act of April 12, 1926 (44 Stat. 239), the Oklahoma statutes of limitations run against the sale of the lands of an Indian minor of less than half blood by the guardian of such minor; and

(4) The cases, both federal and state, holding that the Oklahoma statutes of limitations run against a void as well as a voidable guardian's sale and deed.

The first line of authorities above referred to, to the effect that, irrespective of the Act of April 12, 1926 (44 Stat. 239), the Oklahoma statutes of limitations run against the approved deed of a full-blood Indian heir, not under guardianship, covering the inherited lands of such heir, is illustrated by the case of *Harjo, et al.*, v. *Empire Gas & Fuel Co.*, 28 F. (2d) (8 C. C. A.) 596, in which it was held:

> "Right of Indians to have regularly approved deed set aside on the ground of fraud could be lost by laches or statute of limitations in the same manner as in the case of white persons."

In that case, Jimpka, Milsey and Molly Harjo, full-blood Seminole Indians, having inherited the allotment of one Sanko, a full-blood Seminole Indian, executed a deed therefor to C. W. Oliver. This deed was duly approved by the County Court of Seminole County, Oklahoma, which had jurisdiction of the estate of Sanko. However, it was claimed by Jimpka, Milsey and Molly that said deed was obtained through fraud, to which claim the defense of laches and the statute of limitations was interposed. In the course of the opinion in the case Judge KENYON said:

> "The deed being approved, as provided by law, the Indians as to the question of setting the same aside on

the ground of fraud were in no different position than a white person would be, and the right to attack the deed for fraud could be lost by laches or the statute of limitations. *Schrimpscher* v. *Stockton*, 183 U. S. 290, 22 S. Ct. 107, 46 L. ed. 203; *Felix* v. *Patrick*, 145 U. S. 317, 12 Sup. Ct. 862, 36 L. ed. 719. This is not a situation where a transfer of Indian lands is void because of violation of government restrictions. Hence it does not present an attempt to circumvent the federal statutes by divesting title by a stipulation in court. We see no reason why the claim of the Indians in the District Court of Seminole County that the deed had been secured by fraud could not be settled and waived by the attorneys for the government authoritatively representing said Indians in the litigation."

To the same effect is the case of *Conner* v. *Cornell*, 32 F. (2d) 581, in which the Eighth Circuit Court of Appeals applied the law of estoppel by a judgment of dismissal to an attempted attack upon an approved conveyance made by certain full-blood Indians after the Act of May 27, 1908 (35 Stat. 312), of their inherited interest in the allotment of a deceased Indian.

Bearing in mind that in the case at bar we are not dealing with the individual allotment of the appellant, but are dealing with his inherited interest in the allotment of his grandmother, Lizzie Toney, and that the only attack that the appellant makes upon the guardian's deed involved herein is that the appointment of his guardian was irregular, the two above cases are particularly applicable. Appellant does not seriously contend that the County Court of Hughes County, Oklahoma, did not have general jurisdiction to adjudge that he was mentally incompetent, to appoint a guardian for his person and estate or to authorize and approve the sale of his inherited interest in the lands involved

herein. He principally claims that the proceedings in connection with the appointment of John A. Jacobs, as guardian of his person and estate, were so irregular as to be void.

If we were dealing with the plaintiff's own allotment, we would be confronted with an entirely different question.

Where an Indian's allotment, or his interest in an inherited allotment, is sold in the manner authorized and prescribed by an Act of Congress, whether the sale be by the Indian himself or by his guardian, what good reason exists for saying that, merely because there were some irregularities in the proceedings, the statutes of limitations are not applicable thereto? We cannot conceive of any. If the appellant had been mentally competent and not under guardianship, he could have executed a deed covering his inherited interest in the lands involved herein and upon the approval thereof by the County Court having jurisdiction to settle the estate of his grandmother, Lizzie Toney, said deed would have been good and valid. As it was, he was under guardianship and the deed involved herein was necessarily executed by his guardian, but nevertheless and in spite of any irregularities in the appointment of his guardian, he received the same supervision and protection that he would have received if he had not been under guardianship and had executed the deed himself. In fact, he received more, for the reason that under the sale proceedings involved herein his interest in the lands involved herein was appraised and advertised for sale and sold to the highest bidder, which would not have been the case had he not been under guardianship.

In this connection we would call attention to the cases of *Schrimpscher, et al.*, v. *Stockton, et al.*, 183 U. S. 290, 46

L. ed. 203, and *Felix, et al.*, v. *Patrick, et al.*, 145 U. S. 317, 36 L. ed. 719.

Schrimpscher, et al., v. *Stockton, et al., supra*, was an action to recover lands allotted to Carey Rodgers, an incompetent Wyandotte Indian, and conveyed by him to the defendants. Said lands were allotted under a treaty, which provided for the issuance of patents in fee simple to incompetent Indians of the Wyandotte Nation, subject to the condition that such lands should not be sold or alienated for a period of five years and not then without the express consent of the President of the United States. After the issuance of said patent the allottee executed his deed to the defendants, which was not approved by the President. Subsequently, a treaty was ratified, which provided that all restrictions upon the sale of lands patented to incompetent Wyandotte Indians under the Treaty of 1855, should be removed, "but that no sale of lands heretofore assigned to orphans or incompetents shall be made under decree of any court, or otherwise, for or on account of any claim, judgment, execution or order or for taxes until voluntarily sold by the patentee or his or her heirs *with the approval of the Secretary of the Interior.*" In said case this court held:

> "Conceding that so long as Indians maintain their tribal relations they are not chargeable with laches or failure to assert their claims within the time prescribed by statute, they lose such immunity when their relations with their tribe are dissolved by accepting allotments of land in severalty under a treaty which provides that the organization and relation of such Indians with the United States as an Indian tribe shall be dissolved and terminated on the ratification of such treaty, and that such Indians shall be deemed to be citizens of the United States, and entitled to all rights, privileges, and immunities as such."

In the body of the opinion the court said:

"No action was ever taken under the 3d clause to procure a confirmation by the Secretary of the Interior of the deed by Rodgers of November 15, 1864, so that, at the time the treaty of 1868 was ratified, the possession of the lands was in the defendants or their grantors holding adversely to the heirs of Rodgers, but the title still remained in such heirs by reason of the fact that his deed to Cooper and Stockton was void, and no proceeding had been taken under the 3d clause of article XV, to confirm or validate it. But although the treaty of 1855 and the patent to Rodgers had expressly provided that there should be no alienation by the grantee or his heirs, the treaty of 1868, which took effect after his death, removed all restrictions upon alienations which should thereafter be made, either by the incompetent grantee Rodgers or his heirs, who thereafter held an alienable title, and were bound to assert such title within the time specified by the statute of limitations, although no title could be gained by adverse possession so long as the land continued to be inalienable by Rodgers and his heirs. *McGannon* v. *Straightlegs*, 32 Kan. 524, 4 Pac. 1042; *Sheldon* v. *Donohoe*, 40 Kan. 346, 19 Pac. 901."

In *Felix, et al.*, v. *Patrick, et al., supra*, this court held:

"Where a suit to establish the equitable title to land was brought twenty-seven years after the legal title was wrongfully acquired by defendant, such equitable relief will be denied on the ground of laches; that the plaintiffs are members of an Indian nation is not sufficient excuse for the laches."

In said case, the government, in 1857, issued scrip to Sophia Felix, a half-blood Sioux Indian, which entitled her to locate 480 acres of land. The act under which the said scrip was issued expressly provided that no transfer or conveyance thereof should be valid. Thereafter Sophia Felix

issued a power of attorney to some unknown party to locate 120 acres of land and at the same time executed in blank a quit-claim deed. Said scrip came into the hands of the defendant, Patrick, and he located said land in the name of Sophia Felix and inserted his name as grantee in the quit-claim deed. The action was filed by the heirs of Sophia Felix to recover said 120 acres of land, approximately twenty-seven years after the legal title was acquired by Patrick. In holding that the plaintiffs were estopped to assert equitable relief, Mr. Justice Brown said that the device of a blank power of attorney and quit-claim deed were doubtlessly resorted to for the purpose of evading the provisions of the Act of Congress to the effect that no transfer or conveyance of the scrip issued thereunder should be valid, and that in making said scrip non-assignable, Congress in effect imposed a restriction upon the alienation of the lands assigned thereunder.

The second line of authorities above referred to, to the effect that, irrespective of the Act of April 12, 1926 (44 Stat. 239), the Oklahoma statutes of limitations run against the sale of the inherited lands of a full-blood Indian heir, under guardianship, by the guardian of such heir, through the County Court appointing the guardian, is illustrated by the case of *Dierks, et al.*, v. *Isaac, et al.*, 114 Okl. 158, 244 Pac. 750. In that case William Isaac, as guardian of Jim and Leila Isaac, who were minor full-blood Choctow Indians, undertook to sell the inherited interest of said minors in and to the allotment of Sadie Isaac, the full-blood Indian sister of said minors. The sale was through the County Court of Atoka County, Oklahoma, and the guardian's deed was executed, acknowledged, delivered and recorded on the 28th day of May, 1909, and the purchaser thereupon went into

possession of the lands covered by said deed and remained continuously in such possession thereafter. Jim Isaac became 21 years of age on the 15th of April, 1916, and Leila Isaac became 18 years of age on the 18th of April, 1914. Subsequently, on the 1st of November, 1919, Jim and Leila Isaac commenced their action to recover the involved lands on the theory that the attempted sale thereof by their guardian was void. The defendants interposed the above referred to statutes of limitation, and the court held that notwithstanding the fact that Jim and Leila Isaac were both full-blood Indians, their action was barred. In the course of the opinion in said case, which was delivered by Justice PHELPS, it was said:

"Plaintiffs in error present four propositions upon which they base their right to have the judgment of the District Court reversed, only two of which are necessary for us to consider in determining the rights of the parties herein.

"First, they claim that plaintiffs are barred from filing and prosecuting their action to recover the real estate in question, for the reason that more than three years elapsed after they arrived at their majority and their guardian was discharged before they commenced the proceedings to recover the land, and cite section 184, Comp. Stats. 1921, which reads as follows:

'Any person entitled to bring an action for the recovery of real property, who may be under any legal disability when the cause of action accrues, may bring his action within two years after the disability is removed.'

"Also section 1496, Comp. Stats. 1921, which reads as follows:

'No action for the recovery of any estate, sold by a guardian, can be maintained by the ward, or

by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof.'

"In *Dodson* v. *Middleton*, 135 P. 368, 38 Okl. 763, this court had this question under consideration when it used the following language:

'The trial court found that at the time the Probate Court of Logan County issued letters of guardianship and ordered the sale of the land by the guardian, said court was without jurisdiction, because defendants were then residents of Kingfisher County, and upon this ground rendered a judgment in favor of defendants for the relief prayed for in their cross petition. The facts established by the evidence are substantially the same as the foregoing allegations of the pleadings, except that it is shown by the evidence that more than five years had elapsed since the recording of the guardian's deed prior to the institution of defendants' action upon their cross petition, and more than two years had elapsed after defendant Hannah Middleton had become of age, and prior to the institution of her action, but that less than two years had elapsed since the attainment of her majority of defendant Lydia Middleton prior to the bringing of her action.'

"And in the syllabus thereof makes use of the following language:

'Where the grantee went into possession of real estate immediately after the purchase thereof by him at a void guardian's sale, and such grantee and those claiming under him remain continuously in possession thereof thereafter, and where the action to recover said real estate is not brought by the minor or his guardian within five years after

> the recording of the deed nor by the minor within two years after his legal disability is removed, an action by such minor for the recovery of said property is barred by sections 5547-5549, Comp. Laws 1909.' (It will be noted that section 5549 of the Statutes of 1909 is now section 184, Comp. Stats. 1921.)

"In *Glory* v. *Bagby*, 188 P. 881, 79 Okl. 155, this court had under consideration this section of the statute, and in the fourth paragraph of the syllabus made use of the following language:

> 'Where a minor's property has been sold at a void or fraudulent guardian's sale, and a guardian's deed executed and filed of record * * * the minor's cause of action is not barred by reason of subdivision 2, section 4655, R. L. 1910, within five years after the recording of the deed, but by virtue of section 4656, R. L. 1910, the minor may begin an action to set aside said sale at any time prior to two years after his legal disability is removed.'

"It will be observed that section 4656, R. L. 1910, is our section 184, Comp. Stat. 1921, and as this construction seems to have been thoroughly adopted by this court, we deem it unnecessary to cite further authorities.

"It is the contention of attorneys for plaintiffs, however, that the plaintiffs, being full-blood Choctaw Indian minors, and having inherited full-blood Indian lands, were restricted Indians as to such inherited lands under the provisions of section 9 of the Act of Congress of May 27, 1908 (35 Stat. 315), which reads as follows:

> 'That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, that no conveyance of any interest of any full-blood Inadian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.'

"In *Harris, et al.*, v. *Bell, et al.*, 41 S. Ct. 49, 254 U. S. 163, 65 L. ed. 159, the Supreme Court of the United States held that the proviso of section 9 requiring the approval of conveyances by the county court having jurisdiction of the estates of deceased allottees does not apply to full-blood Indian minors, and that the provision of section 6, giving the county court jurisdiction of the person and estate of all Indian minors is the only provision applicable to such Indian minors; and in paragraphs 4 and 5 of the syllabus used the following language:

> 'Lands inherited from a deceased Indian allottee were not included in or affected by the provision in the Act of May 27, 1908, section 6, that no restricted lands of living minors shall be sold or incumbered except by leases authorized by law, by order of the court, or otherwise.
>
> 'Adult heirs only must be regarded as comprehended by the proviso in the Act of May 27, 1908, section 9, that no conveyances of any interest of any full-blood Indian heir shall be valid unless approved by the court having jurisdiction of the settlement of the estate of a deceased allottee, in view of the provision of section 6 of such act, subjecting the persons and property of minor Indians to the jurisdiction of the Oklahoma probate courts, and hence a guardian's conveyance for minor heirs of a deceased allottee, directed and approved by the court having control of the guardianship, need not also be approved by the court having jurisdiction of the deceased allottee's estate.'

"It therefore appears to be well settled that the inherited lands of such heirs were not restricted, and they were not personally restricted as to *such* inherited lands under the proviso of section 9. The only personal restriction upon such full-blood Indian heirs are the same as those upon other *minors* of Oklahoma without regard to Indian blood. This court has

held that the inherited lands of full-blood Indians were freed of all restrictions under the first provision of section 9 of the Act of May 27, 1908, and that, at most, the proviso to that section was a personal restriction upon full-blood Indian heirs and not a restriction upon the land, and that the only restriction imposed by said proviso on full-blood Indian minor heirs was that the probate court should approve the conveyance as that court is required to do in all guardian sales, regardless of the blood of the minor. That being true, it necessarily follows that the statute of limitation that applies to attacks on guardian's sales as to all minors applies to the full-blood minor heirs in relation to their inherited lands.

"In *King* v. *Mitchell*, 171 P. 725, 69 Okl. 207, in paragraphs 5 and 6 of the syllabi, it is said:

> 'Under the provisions of section 9 of the Act of Congress of May 27, 1908 (35 Stat. L. 312), the death of an allottee of the Five Civilized Tribes operated to remove all restrictions upon the alienation of said allottee's land. The first proviso in said section, "that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee," imposed a merely personal restriction on the full-blood Indian heirs. The restrictions thus imposed was simply an incapacity to convey without the approval of the proper county court, similar to the disability of a minor to sell his lands.
>
> 'Lands inherited by full-blood Creek Indian minor from a full-blood Creek allottee are not "restricted lands" within the purview of the proviso in section 6 of the Act of May 27, 1908 (35 Stat. 312), prohibiting the sale or incumbrance of restricted lands of living minors, except by leases authorized by law, by order of the court, or otherwise.'

"This court had this subject under consideration in *Chupco, et al.*, v. *Chapman, et al.*, 170 P. 259, 76 Okl. 201, and in a well-written opinion by Mr. Justice RAINEY, used the following language in paragraphs 5 and 6 of the syllabi:

> 'Under the provisions of section 9 of the Act of Congress of May 27, 1908, the death of an allottee, of the Five Civilized Tribes operated to remove all restrictions upon the alienation of said allottee's lands. The first proviso in said section, "that no conveyance of any interest of any full-blood Indian heir in such lands shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee," imposed a merely personal restriction on the full-blood Indian heirs. The restriction thus imposed was simply an incapacity to convey without the approval of the proper county court, similar to the disability of a minor to sell his lands.
>
> 'Lands inherited by full-blood Creek Indian minors from a full-blood Creek allottee are not "restricted lands" within the purview of the proviso in section 6 of the Act of Congress of May 27, 1908, prohibiting the sale or incumbrance of restricted lands of living minors, except by leases authorized by law, by order of the court, or otherwise.'

"This rule was adhered to by this court in *King* v. *Shults*, 180 Pac. 550, 72 Okl. 254, and followed in *Seiffert* v. *Jones*, 186 P. 472, 187 P. 223, 77 Okl. 204; also *Stewart* v. *Burrows*, 193 P. 881, 80 Okl. 23."

The foregoing case was decided by the Supreme Court of Oklahoma the 14th of July, 1925, and it has never been overruled or modified, and it is clear therefrom that the above referred to statutes of limitations were applicable to the case at bar, notwithstanding the fact that the appellant happens to be a full-blood Creek Indian.

Upon substantially the same state of facts as are involved in the case at bar and as was involved in *Dierks, et al.*, v. *Isaac, et al., supra*, the Supreme Court of Oklahoma followed *Dierks, et al.*, v. *Isaac, et al.*, in the following cases: *Bearhead* v. *American Inv. Co.*, 159 Okl. 84, 10 P. (2d) 1086; *Givens* v. *Jones*, 158 Okl. 124, 12 P. (2d) 892; *Washington* v. *Bartlett, et al.*, 158 Okl. 218, 15 P. (2d) 132; *Deere* v. *Gilmore, et al.*, 158 Okl. 217, 13 P. (2d) 162; *Deere* v. *Gypsy Oil Co.*, 160 Okl. 237, 15 P. (2d) 1086; *Little* v. *Miracle, et al.*, 167 Okl. 388, 29 P. (2d) 970; and the case at bar.

The only difference between any of the foregoing cases and the case at bar is that said cases involved minor full-blood heirs and the case at bar involves an incompetent full-blood heir. This, however, is insufficient to distinguish the cases, because, as we have heretofore said, the construction which this court, in the case of *Harris, et al.*, v. *Bell, et al.*, 254 U. S. 103, 65 L. ed. 159, placed upon sections 6 and 9 of the Act of May 27, 1908 (35 Stat. 312), results in putting an incompetent full-blood heir, with respect to his inherited lands, in the same category as a full-blood minor heir, with respect to his inherited lands.

The third line of authorities above referred to, to the effect that, irrespective of the Act of April 12, 1926 (44 Stat. 239), the Oklahoma statutes of limitations run against the sale of the lands of an Indian minor of less than half blood by the guardian of such minor, is illustrated by the decision of this court in the case of *Joines* v. *Patterson*, 274 U. S. 544, 71 L. ed. 1194, which involved the application of the statutes of limitations to a guardian's deed covering the inherited interests of certain Indian minors of less than half blood in the allotment of their deceased mother. The Su-

preme Court of Oklahoma (114 Okl. 9, 244 Pac. 585), had held, upon several grounds, that the guardian's deed was void and that the statutes of limitations did not run against the same. This court granted a writ of *certiorari* and held:

> "Open, peaceful possession by one purchasing lands at a guardian's sale made under order of a court of competent jurisdiction for the statutory period bars the right of the guardian and his wards to recover possession of the property as heirs of their ancestor."

In the course of its opinion, the court said:

> "Joines went into open, peaceful possession of the allotted lands October 5, 1907, when the following parts of chapter 97, Mansfield's Digest, were in force:
>
> > '*Section 4471.* No person or persons, or their heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments but within seven years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued; and all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments shall be had and sued within seven years next after title or cause of action accrued, and no time after said seven years shall have passed. • • •
> >
> > '*Section 4476.* No action for the recovery of real property, when the plaintiff does not claim title to the lands, shall be brought or maintained when the plaintiff or his testator or intestate, has been five years out of possession.'
>
> "Under the settled construction given to the seven-year statute of limitations by the courts of Arkansas, it began to run against Patterson when Joines took possession. 'So long as a man is in possession of land, claiming title, however wrongfully, and with whatever degree of knowledge that he has no right, so long the real owner is out of possession, in a construc-

tive as well as an actual sense. It is of the nature of the statute of limitation, when applied to civil actions, in effect, to mature a wrong into a right by cutting off the remedy. To warrant its application to ejectment, the books require color of title, by deed or other documental semblance of right in the defendant, only when the defense is founded on a constructive adverse possession. But neither a deed nor any equivalent muniment is necessary, where the possession is indicated by actual occupation, and any other evidence of an adverse claim exists. The muniment is but one circumstance by which to make out an adverse possession.' *Ferguson* v. *Peden*, 33 Ark. 150, 155; *Jacks* v. *Chaffin*, (1879) 34 Ark. 534, 541; *Logan* v. *Jelks*, 34 Ark. 547, 549.

"The Supreme Court of Oklahoma seems definitely to have approved the doctrine that rights of action arising in Indian Territory prior to the statehood remained subject to the Arkansas statute of limitations. *Patterson* v. *Rousney*, 58 Okl. 185, 202, 159 Pac. 636; *Davis* v. *Foley*, 60 Okl. 87, 88, L. R. A. 1917-A, 187, 159 Pac. 646. And see *United States Fidelity & G. Co.* v. *Fidelity Trust Co.*, 49 Okl. 398, 408, 153 Pac. 195; *Sandlin* v. *Barker*, 95 Okl. 113, 117, 218 Pac. 519."

The interests of the Indian minors involved in the above case could only be sold through the proper County Court (section 22, Act April 6, 1906, 34 Stat. 137), and therefore said case, particularly when examined in connection with the opinion of the Supreme Court of Oklahoma, is directly in point with the case at bar.

Likewise, the Supreme Court of Oklahoma in *Glory* v. *Bagby, et al.*, 79 Okl. 155, 188 Pac. 881; *Walker* v. *Hatcher, et al.*, 109 Okl. 283, 231 Pac. 88; *Anicker, et al.*, v. *Harrison, et al.*, 125 Okl. 21, 256 Pac. 39; *Martin, et al.*, v. *Goodman, et al.*, 126 Okl. 34, 258 Pac. 871; *Tiger* v. *Brown, et al.*, 130

Okl. 83, 265 Pac. 124; and doubtless numerous other cases has consistently held that the statutes of limitation run against the sale of the lands of an Indian minor of less than half blood by the guardian of such minor.

The case of *Walker* v. *Hatcher, et al., supra,* involved a probate sale of the allotment of Oscar W. Walker, a minor, enrolled as a Choctaw of one-fourth blood, by the guardian of said minor, and the Supreme Court of Oklahoma held:

> "Where the grantee under a guardian's deed, and those claiming under him, have been in continuous possession of real property since the purchase thereof at a guardian's sale, an action by the ward to recover the property, commenced more than eight years after the guardian's deed was recorded, and more than seven years after the termination of the guardianship, and more than three years after the ward had reached his majority, is barred by subdivision 2, section 183, and by section 1496, Comp. Stat. 1921, and it is not material whether the guardian's deed was valid, voidable or void."

What difference is there in the applicability of the statutes of limitations to a guardian's sale of the allotment of an Indian minor of less than half-blood and a guardian's sale of the inherited interest of a minor or incompetent full-blood heir? We cannot conceive of any. Under the Act of May 27, 1908 (35 Stat. 312), the allotment of a minor Indian of less than half blood can be sold only through the County Courts of Oklahoma, in accordance with the probate laws of said state, and there is the further provision of said act that, irrespective of the laws of Oklahoma, an Indian minor, in case of a female, is one under eighteen years of age, and in case of a male, one under twenty-one years of age, and the Enrollment Records are conclusive as to age. (Sections

1, 3 and 6 of the Act of May 27, 1908, 35 Stat. 312). The construction which this court in the case of *Harris, et al.*, v. *Bell, et al., supra,* places upon the Act of May 27 1908, results in placing the inherited lands of minor and incompetent full-blood heirs in the same category as the allotted lands of Indians of less than half-blood. If anything, the lands of the latter are more restricted than those of the former. Therefore, it would seem that the statutes of limitations are just as applicable to the probate sales of the inherited interests of minor and incompetent full-blood heirs as to the probate sales of the lands of Indians of less than half blood. And we have never heard it even intimated that the statutes of limitations were not applicable to the latter class of sales.

The fourth line of authorities above referred to, to the effect that the Oklahoma statutes of limitations run against a void as well as a voidable guardian's sale and deed, is illustrated by the decision in the case of *Dodson* v. *Middleton,* 38 Okl. 763, 135 Pac. 368, in which it was held:

> "Where the grantee went into possession of real estate immediately after the purchase thereof by him at a void guardian's sale, and such grantee and those claiming under him remain continuously in possession thereof thereafter, and where the action to recover said real estate is not brought by the minor or his guardian within five years after the recording of the deed, nor by the minor within two years after his legal disability is removed, an action by such minor for the recovery of said property is barred by sections 5547-5549, Comp. Laws 1909."

The decision of this court in the case of *Joines* v. *Pattersan, supra,* is to the same effect.

The case of *Dodson* v. *Middleton, et al., supra,* was decided by the Supreme Court of Oklahoma in 1913. Since that time that court has consistently held that the Oklahoma statutes of limitations apply to a void as well as a voidable guardian's sale. See *Glory* v. *Bagby*, 79 Okl. 155, 188 Pac. 881; *Wray* v. *Howard*, 79 Okl. 223, 192 Pac. 584; *Sandlin* v. *Barker*, 95 Okl. 112, 218 Pac. 519; *Walker* v. *Hatcher*, 109 Okl. 283, 231 Pac. 88; *Dierks, et al.*, v. *Isaac, et al.*, 114 Okl. 158, 244 Pac. 750; *Anicker, et al.*, v. *Harrison, et al.*, 125 Okl. 21, 256 Pac. 39; *Martin* v. *Goodman*, 126 Okl. 34, 258 Pac. 871; *Tiger* v. *Brown*, 130 Okl. 83, 265 Pac. 124; *Bearhead* v. *American Inv. Co.*, 157 Okl. 84, 10 Pac. (2d) 1086; *Givens* v. *Jones*, 158 Okl. 124, 12 P. (2d) 892; *Washington* v. *Bartlett, et al.*, 158 Okl. 218, 13 P. (2d) 132; *Deere* v. *Gilmore*, 158 Okl. 217, 13 P. (2d) 162; *Deere* v. *Gypsy Oil Co.*, 160 Okl. 237, 15 P. (2d) 1086, and the case at bar.

We, therefore, submit that although Noah Stewart was a full-blood Creek Indian, and conceding, for the sake of argument, that the appointment of guardian and probate sale involved herein were absolutely null and void, appellant's action was barred by sections 99, 100 and 1444 of the Oklahoma Statutes, 1931, approximately eight years prior to the commencement thereof, or approximately five years prior to the Act of April 12, 1926 (44 Stat. 239).

We reiterate that Congress, having subjected minor and incompetent full-blood Indians, with respect to their inherited lands, to the County Courts of Oklahoma, this court will follow the construction which the Supreme Court of that state has placed upon its statutes dealing with the appointment of guardians for minors and incompetents and the sale of their lands, together with the effect of such pro-

ceedings. That this is true was established by this court in the case of *Bunch* v. *Cole, et al.*, 263 U. S. 250, 68 L. ed. 290, in which it was held:

> "The Supreme Court of the United States will, in dealing with the effect of a state statute, treat it as being intended to operate as the highest court of the state has construed it."

Likewise, in the case of *Joines* v. *Patterson, et al.*, 274 U. S. 544, 71 L. ed. 1194, this court held:

> "The extension over Indian Territory of the laws of Arkansas carried the settled constructions placed upon them by the courts of that state, and as so construed they have become in effect laws of the United States."

IV.

The Act of April 12, 1926 (44 Stat. 239), was not applicable to appellant's cause of action attacking the above guardian's deed for the following reasons: *(a)* Appellant was not a "restricted" Indian, nor was his interest in the lands involved herein "restricted," within the meaning and purview of said act; and, *(b)* said act was not intended to apply to a cause of action to which the statutes of limitation of the State of Oklahoma were theretofore applicable and had fully run long prior to the enactment of said act.

We have set out in the Appendix hereto section 2 of the above act, but for the purpose of convenience will re-quote it:

> "The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians, and against all rights and causes of action heretofore accrued or here-

after accruing to any such Indians, or their heirs or grantees, to the same extent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any such Indian, his or her heirs or grantees, either in his own behalf or by the government of the United States, or by any other party for his or her benefit, to the same extent as though such action were brought by or on behalf of any other citizen of said state: *Provided*, that no cause of action which heretofore shall have accrued to any such Indian shall be barred prior to the expiration of a period of two years from and after the approval of this act, even though the full statutory period of limitation shall already have run or shall expire during said two years' period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years' period free from any bar of the statutes of limitations."

In five cases, including the case at bar, the Supreme Court of Oklahoma has held in accordance with the above proposition. See, *Tomlin* v. *Roberts, et al.*, 126 Okl. 165, 258 Pac. 1041; *Bearhead* v. *American Inv. Co., et al.*, 157 Okl. 84, 10 P. (2d) 1086; *Deere* v. *Gypsy Oil Co.*, 160 Okl. 237, 15 P. (2d) 1086; *Little* v. *Miracle, et al.*, 167 Okl. 388, 29 P. (2d) 970; and the case at bar, 167 Okl. 531, 30 P. (2d) 875.

In *Bearhead* v. *American Inv. Co., et al., supra*, the court held:

"The proviso of section 9 of the Act of Congress of May 27, 1908 (35 Stat. 312), requiring the approval of conveyance by the county court having jurisdiction of the estates of deceased allottees, does not apply to full-blood Indian minors, and the provision of section 6 giving the county court jurisdiction of the person and

estate of all Indian minors is the only provision applicable to such Indian minors.

"The two-year provision in the Act of Congress of April 12, 1926 (44 Stat. 239), is not applicable to causes of action where the land in controversy is not restricted.

"Lands inherited by full-blood Creek Indian minors from a full-blood Creek allottee are not 'restricted lands' within the purview of the proviso in section 6 of the Act of Congress of May 27, 1908 (35 Stat. 312, 313), prohibiting the sale or incumbrance of restricted lands of living minors, except by leases authorized by law, by order of the court, or otherwise."

In the course of the opinion in said case the court said:

"The sale was confirmed on February 23, 1922. The guardian's deed was executed on March 16, 1922, and filed for record on that date. This action was commenced on October 8, 1928. The action was barred by the provisions of sections 183 and 184, C. O. S. 1921. *Dodson* v. *Middleton, et al.*, 38 Okl. 763, 135 P. 368; *Wray* v. *Howard, et al.*, 79 Okl. 223, 192 P. 584; *Walker* v. *Hatcher, et al.*, 109 Okl. 283, 231 P. 88, and *Dierks, et al.*, v. *Isaac, et al.*, 114 Okl. 158, 244 P. 750.

"The plaintiff states in his brief that this action was commenced under the authority of section 2 of the Act of Congress of April 12, 1926 (44 Stat. 239), known as the Hastings-Harreld Act. The two-year provision of that act is not applicable to actions involving land which is not restricted. *Tomlin* v. *Roberts, et al.*, 126 Okl. 165, 258 P. 1041. The land in question is not restricted land within the meaning of section 6 of the Act of Congress of May 27, 1908 (35 Stat. 312, 313); *King* v. *Mitchell, et al.*, 69 Okl. 207, 171 P. 725; *Chupco, et al.*, v. *Chapman, et al.*, 76 Okl. 201, 170 P. 259, and *Dierks* v. *Isaac, supra*."

In the case of *Tomlin* v. *Roberts, et al., supra*, an Indian, whose homestead allotment was restricted, commenced

an action to cancel a deed which she had given to her unrestricted surplus allotment. The defendants contended that the action was barred by the statutes of limitations and the plaintiff contended that even though limitations had matured against her she was a "restricted" Indian, and, her action having been brought within two years of the effective date of the Act of April 12, 1926 (44 Stat. 239), the defendants' contention must fail by virtue of section 2 of said act. But the Supreme Court of Oklahoma said:

> "The land involved is the surplus allotment of the plaintiff. The restrictions on it expired in 1907 and before the Creegan deed was executed. Plaintiff contends that she can maintain this suit for a period of two years after the approval of the act, although the statute of limitations had matured before such approval. We cannot agree with this contention. In the *first* place, there is no allegation in the petition that plaintiff is a restricted Indian within the meaning of this act. It is true that under the law her homestead might be restricted, or restrictions may have been removed from her homestead by the Secretary of the Interior, and may have been sold. In the *second* place, it is clear that the land in controversy has been free from restrictions since 1907, and was free from restrictions when the Creegan deed was executed. For plaintiff to be able to maintain a suit within the additional two-year period above provided for, after limitations had already matured before the passage of the act, it would be necessary for the land in controversy to be 'restricted land'. In passing the act, it was doubtless not the intention of Congress to preclude any Indian who owned restricted land from bringing their suit within the two-year period, where limitations had already ripened. It undoubtedly was the intention to give a two-year period after the approval of the act within which to bring such an action. If not brought within such time, the cause would be forever barred."

Reading the second section of the Act of April 12, 1926 (44 Stat. 239), literally, there is no question but what Mary Tomlin, plaintiff in the foregoing case, was a "restricted Indian", but the Supreme Court of Oklahoma rightly held that since her surplus allotment, the land involved, was unrestricted, she was not a "resticted Indian" within the meaning of said act.

In the case of *Deere* v. *Gypsy Oil Co., supra,* which involved a guardian's sale of the inherited lands of a minor full-blood Indian, the court said:

> "Plaintiff further contends that Congress had the right to extend the time for filing said suit by the Act of Congress, chapter 115, vol. 44, U. S. Stat. 240, of the Sixty-ninth Congress, passed and approved April 12, 1926.
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> "In the case at bar plaintiff was more than 21 years old on April 12, 1919. Under section 1496, C. O. S. 1921, as construed in *Tiger* v. *Brown, supra,* said section is applicable in this case.
>
> "When plaintiff attained his majority, disability to sue terminated, and the statute of limitations began to run from that date, which, under the allegations in the petition, would be April 12, 1919. Under section 1496, he had three years after said date to bring said cause of action, or until April 12, 1922. Upon the expiration of said date, plaintiff's rights were barred by the statute of limitation, and the title of the owner and holder of said land ripened into a good and valid title.
>
> "In connection with the above state of facts, we have carefully considered said act and purpose and intention of Congress in passing the same and interpret and construe said act to mean that an Indian to whom had accrued a cause of action, but upon which said cause the statute of limitation had not run—that

said person could bring a suit thereon within two years from the date of the passage of said act. provided said cause of action was a valid cause of action against which no limitation existed at the time of the passage of said act.

"We further hold that said act intended that, where a cause of action had accrued to an Indian long prior to the passage of said act and the various statutes of limitation of the State of Oklahoma had run against said cause of action, and that the same was barred under the said statutes of limitation, under such circumstances said cause of action was not revived by said Act of Congress; that it was not the intention of Congress to revive dead causes of action by the proviso in said act, but it was the legislative intent to preserve to said persons for a period of two years such causes of action as would mature within the two-year period of time. Thus, where an Indian had a cause of action upon which the statute of limitations would run shortly after the passage of said Act of Congress, said Indian would have two years after the passage of said act to bring suit thereon under the saving clause of the proviso, but said proviso does not apply where the statute of limitations has run. This we consider as the logical and reasonable meaning to be given to the language used in said statute.

"Therefore, when said act was passed, it did not give plaintiff two years to bring said action, because the statute of limitations had expired against his cause of action long prior thereto."

The question of the applicability of the Act of April 12, 1926 (44 Stat. 239), to the case at bar depends in part upon what Congress meant by the words "restricted Indians" as used in section 2 thereof. And said question, at least insofar as the case at bar is concerned, is conclusively answered by the decision of this court in the case of *Harris, et al.*, v. *Bell, et al.*, 254 U. S. 103, 65 L. ed. 159, and a long

line of Oklahoma decisions to the same effect. In *Harris, et al.*, v. *Bell, et al.*, this court said:

> "Section 6 of the Act of 1908 subjects the persons and property of minor allottees to the jurisdiction of the probate courts of the state, and in a proviso says: 'No *restricted lands* of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court or otherwise.' One ground on which the guardian's sale on behalf of the minor heirs, Amos and Elizabeth, is assailed, is that it was in violation of this proviso. But, in our opinion, the provisio does not include or affect *inherited lands*. It refers, as a survey of the act shows, to lands of living minor allottees, and not to lands *inherited from deceased allottee*. Section 9 expressly recognized that the latter may be sold, and this proviso cannot be taken as prescribing the contrary." (Italics ours.)

Thus it is settled that a full-blood minor heir, with respect to his inherited lands, is not a "restricted Indian", nor are such lands "restricted lands", and, of course, the same thing must be true of a full-blood incompetent heir.

Inasmuch as the Act of May 27, 1908 (32 Stat. 312), expressly and specifically authorized the sale of the inherited lands of minor and incompetent full-blood Indians, all of the allotted lands of Indian minors of less than half blood, and the surplus allotments of Indian minors of more than one-half and less than three-fourths blood, by and through the County Courts of the State of Oklahoma, there is no escape from the conclusion that Congress regarded all such lands as "unrestricted" and such Indians, with respect to said lands, as "unrestricted Indians," otherwise the proviso to section 6 of said act would absolutely and unconditionally prevent any such sales. In other words, when Congress in said proviso used the words "restricted lands", it meant lands which

were *inalienable in any way,* except by an order of the Secretary of the Interior removing restrictions or a subsequent Act of Congress, and clearly and unquestionably disclosed that it regarded the lands of minors, of whatever degree of blood and whether allotted or inherited, which it had provided might be sold through the probate courts, as not "restricted lands", and that such Indians, with respect to such lands, were not "restricted Indians."

In *United States* v. *Gypsy Oil Co.*, 10 F. (2d) (8 C. C. A.) 487, the United States filed an action to cancel an oil and gas lease executed by Wilson Clinton, a full-blood minor Creek Indian, covering his inherited lands, because the same was not approved by the Secretary of the Interior, in accordance with the provisions of section 2 of the Act of May 27, 1908 (35 Stat. 312), but was executed by his guardian and approved by the County Court having jurisdiction of his person and estate. Section 2 of the Act of May 27, 1908 (35 Stat. 312), provides as follows:

> "That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or courator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal; *Provided,* that leases of *restricted lands* for oil, gas or other mining purposes, leases of *restricted homesteads* for more than one year, and leases of *restricted lands* for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

The court held that inherited lands were not *restricted* lands within the meaning of section 2 of said act, and that it

was not necessary to have the approval of the Secretary of the Interior on a lease of inherited lands.

In *Bagby* v. *United States*, 60 F. (2d) (10 C. C. A.) 80, the plaintiff, a minor Creek Indian of one-sixteenth blood, sought to recover income taxes assessed and paid in 1918 on royalty and bonus received under a lease of her surplus allotment. Section 1 of the Act of May 27, 1908 (35 Stat. 312), removed all restrictions upon alienation of lands allotted to Indians of less than half blood, but section 6 thereof made the persons and property of all minor allottees, including minor allottees of less than half blood, subject to the jurisdiction of the probate courts of the State of Oklahoma. Section 4 of said act provided that all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of persons other than allottees of the Five Civilized Tribes. In holding that the lands involved were not restricted, Judge LEWIS, speaking for the court, said:

> "So on reading the excerpts from sections 1 and 4 it would seem to be clear that the tax here in question is valid. But appellant relies on sections 2 and 6, contending that she and her allotment are still under restrictions, notwithstanding sections 1 and 4; that her estate is still under the supervising control of the Secretary of the Interior, and that until 1920 she was a minor ward of the United States, subject to its care and protection. That may be conceded, yet if it clearly appears from said act and the Revenue Act 1918 (40 Stat. 1057) that Congress intended to subject her income to the tax, the assessment was not erroneous and illegal. *Goudy* v. *Meath*, 203 U. S. 146, 27 S. Ct. 48, 51 L. ed. 130; *Choteau* v. *Burnet*, 283 U. S. 691, 51 S. Ct. 598, 75 L. ed. 1353. Section 2 prevents application of shorter periods of minority under state statutes and practice.

McNee v. *Whitehead*, (C. C. A.) 253 F. 546; *Barbre* v. *Hood*, (C. C. A.) 228 F. 658; *Truskett* v. *Closser*, 236 U. S. 223, 35 S. Ct. 385, 59 L. ed. 549. *It is a temporary restriction on personal capacity*, and supplants every state rule or law to the contrary, and coupled with section 6 demonstrates a continuing interest in and retention of a supervising care over the minor's estate to the extent therein limited; *but that does not interfere with alienation of the allotment through proceedings in probate when it is to the interest of a minor that a sale be made*, nor the minor's right to sell on reaching majority. *There is nothing in section 6 or other parts of the act expressing an intention to continue the restrictions on alienation* which were removed by section 1 of the act."

In *McNee* v. *Whitehead*, 253 Fed. (8 C. C. A.) 546, the court held:

"Under Act May 27, 1908, Sections 1, 2, 4, 6, 9, relating to restriction on alienation of lands allotted to Indians, and declaring that death of any aliottee removed restrictions, held that on the death of a half-blood allottee and descent of lands to heirs of less than half Indian blood the lands became subject to taxation prior to their sale through the Oklahoma probate court; the provisions as to minority not changing the matter."

In the body of the opinion the court held.

"As regards restrictions upon the alienation of allotted lands and their exemption from taxation, it was the practice of Congress, recognized by repeated decisions of the courts, to make a clear distinction between those lands still held by the original allottees and those acquired from them by inheritance, and that distinction should be borne in mind in the present case. It is conceded here that, if sections 1, 4 and 9 stood alone, the lands in question would be taxable; but it is argued that the definite prescription of ages of minority and the subjection of the lands of minors so defined to the

orders of the local probate courts amount to the imposition of another restriction upon alienation with its accompanying exemption from taxation, notwithstanding the removal of 'all restrictions' in sections 1 and 9. We do not think the argument is sound. Where Congress so unmistakably manifested an intention to remove all restrictions, it would take language more clear than that before us to indicate that it imposed another at the same time. In one sense the definition of minority and the commission of jurisdiction to the probate courts of the state constitute a limitation or restriction but the purpose was to avoid the rules, sometimes loosely applied, of estoppel, waiver, and ratification in respect of the acts of minors and to prevent premature majority by decree of a court or by marriage as provided by state statutes. This was but a recognition and strengthening of the ordinary disabilities of minority in behalf of those of Indian blood, not an exception to the removal of restrictions upon alienation generally."

The case of *Harris, et al.*, v. *Bell, et al., supra,* was decided by this court in 1920, but in 1917 the Supreme Court of Oklahoma, in the case of *Chupco, et al.*, v. *Chapman, et al.*, 76 Okl. 201, 170 Pac. 259, had reached the same conclusion. In that case the court held that lands inherited by a full-blood Creek Indian minor were not "restricted lands", and in the course of an exhaustive opinion said:

"It is clear from the language of section 9 that after the death of an allottee of the Five Civilized Tribes the allottee's land, as such, is not restricted, except that under the terms of the second proviso of said section the homestead of a deceased allottee having one-half or more Indian blood who dies leaving issue surviving born since March 4, 1906, is made inalienable for the use and support of such issue during their life or lives, until April 26, 1931, unless restrictions against alienations are removed therefrom by the Secretary of the Interior.

With the exception of such homesteads, restrictions are not on these inherited lands, but are personal to the full-blood Indian heirs.

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"This reasoning, we think, exactly fits the case at ba By the very terms of section 9 of the act death operated to remove all restrictions on the alienation of said allottee's land. If the heirs, or any of them, are Indians of less than full-blood they are authorized to sell or convey the land so inherited by them without any supervision. The heirs enrolled as full-blood Indians are also authorized to sell or convey their interest in such inherited lands, but the validity of any such conveyance depends upon the approval of the conveyances by the court having jurisdiction of the settlement of the estate of the deceased allottee. Since said restrictions are personal to the full-blood Indians, and do not run with the land, such inherited land in the hands of full-blood Indians is not restricted land within the meaning of the term as found in the proviso of section 6. It necessarily follows that the jurisdiction of the probate court of Hughes County to order and confirm the guardian's sales of the interests of the full-blood minor plaintiffs in the inherited allotments in controversy was not defeated by virtue of said proviso in section 6."

This court denied a petition for *certiorari* in *Chupco, et al.*, v. *Chapman, et al.* (see 247 U. S. 506, 62 L. ed. 1241).

Since the foregoing case was decided it has been the general understanding of lawyers in Oklahoma that minor and incompetent full-blood heirs, with respect to their inherited lands, are not "restricted Indians", and that such lands are not "restricted lands", and said case has been consistently followed. See *Dierks, et al.*, v. *Isaac, et al.*, 114 Okl. 158, 244 Pac. 750; *King* v. *Mitchell*, 69 Okl. 207, 171 Pac. 725; *King* v. *Shults*, 72 Okl. 254, 180 Pac. 550; *Seiffert*

v. *Jones*, 77 Okl. 204, 186 Pac. 872, 187 Pac. 223; and *Stewart* v. *Burrows*, 80 Okl. 23, 193 Pac. 881.

The above decisions had become a rule of property in Oklahoma long prior to the Act of April 12, 1926 (44 Stat. 239), and we assume that this court will be reluctant to construe said act in a manner contrary thereto.

In the case of *Truskett, et al.*, v. *Closser*, 236 U. S. 223, 59 L. ed. 549, involving a similar situation, it was said:

> "The construction has become a rule of property in the state, and we should be disposed to accept it as such, even if we had doubts of the construction of the Act of May 27, 1908. *Reynolds* v. *Fewell*, 236 U. S. 58, *ante*, 465, 35 Sup. Ct. Rep. 230."

In none of the acts relating to the Five Civilized Tribes, until the passage of the act under consideration, have we found where Congress used the words "restricted Indians."

While in a certain technical sense the lands of any Indian, whether allotted or inherited, which can only be sold by guardian and through a particular probate court, are "restricted," generally, where the words "restricted Indians" or "restricted lands" are used, the understanding is that they refer to Indians who cannot alienate at all, or lands which cannot be alienated at all, except by an order of the Secretary of the Interior removing restrictions or an Act of Congress. The lands of every white person, whether a minor or an adult, are restricted because they can only be alienated by complying with statutory requirements, but, except in this technical sense, such lands are never regarded as restricted. We therefore insist that when Congress, in the Act of April 12, 1926 (44 Stat. 239), used the words "restricted Indians", it had in mind, just as it did when in

the proviso of section 6 of the Act of May 27, 1908 (35 Stat. 312), it used the words "restricted lands", Indians who could not alienate at all, except by an order of the Secretary of the Interior removing restrictions or an Act of Congress.

If the position of appellant is correct, there are no "unrestricted lands" or "unrestricted Indians", under the Act of May 27, 1908 (35 Stat. 312), except adult Indians of less than half blood and adult Indians of more than half and less than three-fourths blood, with respect to their surplus allotment, all other Indians being either absolutely unable to alienate or only under some form of supervision. However, this position is hard to reconcile with the evident purpose of said act, which was entitled: "An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and other purposes", with the language of section 1 of said act, that "all lands, including homesteads, of said allottees enrolled as inter-married whites, as Freedmen, and as mixed-blood Indians having less than half blood including minors, shall be free from all restrictions", and, that "all lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-fourths Indian blood shall be free from all restrictions", and with the language of section 9 of said act, "that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land."

Congress, at the time it enacted the Act of April 12, 1926 (44 Stat. 239), is presumed to have had knowledge of the decision of this court in *Harris, et al.*, v. *Bell, et al.*, *supra*, and the above Oklahoma decisions to the same effect, and it must be inferred that it employed the words "restrict-

ed Indians", in section 2 of said act, in the light of said decisions.

Suppose that section 2 of the Act of April 12, 1926 (44 Stat. 239), had been enacted as a part of the Act of May 27, 1908 (35 Stat. 312). Would not this court then be required to place the same construction upon the words therein, "restricted Indians", as it has placed upon the words, "restricted lands" in section 6 of said Act of May 27, 1908 (35 Stat. 312)?

Although it was the evident purpose of the Act of April 12, 1926 (44 Stat. 239), to put an end to both existing and future controversies in connection with Indian lands, appellant's construction of section 2 of said act would have resulted in opening instead of closing the floodgates of litigation. This, we think, we can clearly demonstrate.

Under appellant's construction, the result would be either *(1)* that prior to April 12, 1926, the statutes of limitations of Oklahoma applied to no Indians, except adult Indians of less than half blood, for, according to his position, all others were restricted, or *(2)* that if said act did apply to any Indians, other than adults of less than half blood, it revived, for at least two years thereafter, every cause of action theretofore accruing to such Indians. Either of these results would, indeed, be revolutionary, in the light of the thousands upon thousands of conveyances, both private and judicial, against which, if there were any questions concerning the validity thereof, it was generally thought, by the courts and lawyers, that the statutes of limitations had fully and effectively run. Thus every minor probate sale, whether of allotted or inherited lands, of which there were thousands, every adult full-blood heir deed, whether ap-

proved by the courts or the Secretary of the Interior, which also ran into the thousands, and probably numerous other conveyances, would have been opened to a new attack, regardless of the amount of time which had expired prior to the Act of April 12, 1926 (44 Stat. 239), and it will be borne in mind that approximately eighteen years had expired between said act and the Act of May 27, 1908 (35 Stat. 312). Most certainly this would be an unreasonable and incongruous result from an act which was intended to terminate and not revive litigation!

If appellant's position is right, we are unable to explain this court's application of the statutes of limitation in *Joines* v. *Patterson, supra,* for undoubtedly the Indians in that case were every bit as "restricted" as appellant.

A few of the conditions which the Act of April 12, 1926 (44 Stat. 239), was intended to remedy were these: Due to the inability to always definitely determine the County Court having jurisdiction to settle the estate of a deceased Indian, there were numerous cases where it was questionable whether or not the deed of a full-blood Indian heir, executed pursuant to section 9 of the Act of May 27, 1908 (35 Stat. 312), had been approved by the proper County Court, and section 1 of the Act of April 12, 1926 (44 Stat. 239), among other things, was intended to terminate all such questions. Then there were numerous conveyances by Indians, which were admittedly in violation of restrictions imposed by Acts of Congress and this and the other federal courts, as well as the Supreme Court of Oklahoma, from the earliest time had consistently held that such conveyances were not subject to any rule of estoppel, including the statutes of limitations. Questions of this character were intended

to be remedied by section 2 of the Act of April 12, 1926 (44 Stat. 239). Then there were many cases where judgments had been rendered against Indians, either as plaintiffs, defendants or interveners, but the courts had uniformly held that such judgments did not bar the United States, and that it could at any time relitigate the questions involved therein. Thus it was a common remark among lawyers in Oklahoma, that an Indian was never precluded by a judgment, unless perchance it happened to be in his favor. Section 3 of the Act of April 12, 1926 (44 Stat. 239), as well as section 2 thereof, was intended to remedy this situation. Congress realized all of the foregoing, and, in enacting the Act of April 12, 1926 (44 Stat. 239), it no doubt entertained the very wise and wholesome thoughts which were expressed by this court in the case of *Wood* v. *Carpenter*, 101 U. S. 135, 25 L. ed. 807, wherein it was said:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is, itself a conclusive bar. The bane and antidote go together."

For the purpose of analyzing the act under consideration, Indians, with respect to the statutes of limitations, might be classified as follows:

(1) Indians, including minors and incompetents, having a cause of action against which the statutes of limitations were not only applicable, but had fully run prior to said

Act of April 12, 1926 (44 Stat. 239). Appellant, we contend, falls within this class, and we further contend that said act was not intended to have any application to said class of Indians.

(2) Indians, including minors and incompetents, having a cause of action against which the statutes of limitation were applicable, but had not fully run prior to the aforesaid act. As to this class of Indians we likewise contend that said act was not intended to apply.

(3) Indians having a cause of action against which the statutes of limitation were inapplicable prior to the aforesaid Act, but at the date thereof the period of time prescribed by the statutes of limitation, which ordinarily would have been applicable, had fully run. As to this class of Indians there is no doubt but what said Act was intended to apply, but the Indians in this class were given until two years after the effective date of said Act within which to sue. Thus it will be seen that although prior to the aforesaid Act the statutes of limitation were not applicable to this class of Indians, Congress authorized counting the period of time that had expired between the date of the accrual of the Indian's cause of action and said Act. In other words, as to this class of Indians, Congress, in effect, enacted a new statute of limitation of two years and refused to allow such Indians to have the period of time within which to sue which they would normally have had, to-wit, the full period of time provided by the existing statutes of limitation, said period of time to be counted from the date that such statutes of limitation first became applicable.

(4) Indians having a cause of action against which the statutes of limitations were inapplicable prior to the afore-

said act, but at the date thereof the period of time prescribed by the statutes of limitation had not fully run, but would run within two years of the date of said act. What we have said with reference to the preceding class of Indians is applicable to this class of Indians.

(5) Indians having a cause of action against which the statutes of limitations were inapplicable prior to the aforesaid act, but at the date thereof the period of time prescribed by the statutes of limitation had not fully run and would not fully run until more than two years thereafter. What we have said with reference to the second preceding class of Indians is applicable to this class of Indians, except it is our position that this class of Indians would not be barred until the full period of limitation had run, although many lawyers in Oklahoma have taken the position that this class of Indians would likewise be barred at the expiration of two years from the date of the aforesaid act.

Appellant no doubt agrees with what we have said with reference to the third, fourth and fifth of the above classes of Indians and probably with reference to what we have said concerning the second class, but takes issue with us as to the first class, contending as to said first class of Indians, that Congress intended to revive for a period of two years the causes of action which were already dead. But if appellant's position is correct, isn't it somewhat strange that Congress would single out the Indians in the third, fourth and fifth paragraphs of the above classification, and, in a sense, impose a burden upon them, to-wit: allow to be counted against them a period of time which theretofore could not have been counted against them, and then, as to the Indians in the first paragraph of said classification

take nothing from and impose no burden upon them, but on the contrary confer a new right upon them, to-wit: give them an additional two years within which to sue, although their causes of action might have been barred many years before? We apprehend that Congress intended doing no such thing.

It must be admitted that the act under consideration, particularly section 2 thereof, is not skillfully drawn, but we earnestly insist that there is nothing in said section which in any wise indicates that Congress intended to revive any cause of action, to which the statutes of limitation were theretofore applicable and the period of time prescribed thereby had fully run at the date of said act. It is to be noted that in the proviso to said section 2, Congress uses the language:

> "* * * even though the full statutory period of limitation shall already have run or shall expire during said two years' period, * * *"

This is quite different from saying although the statutes of limitation were theretofore applicable and the period prescribed thereby had expired or although the Indian's action had theretofore become fully barred. If Congress had intended to say what appellant contents it did, it is submitted that it could have done so in much more appropriate language than that which it actually used. Addressing itself to a similar situation, this court in the case of *Harris, et al.*, v. *Bell, et al.*, 254 U. S. 103, 65 L. ed. 159, said:

> "Had there been a purpose to cut off action by the Secretary as to conveyances already made, some of which were before him at the time, it is but reasonable to believe that other words aptly expressing that purpose would have been used. The matter hardly would have been left to conjecture or uncertain implication."

Our contention that Congress in the act under consideration did not intend to revive any causes of action, which were already barred, even though the same had existed in favor of "restricted Indians", finds support, if not complete justification, in the following italicized words of section 2 of said act: "The statutes of limitation of the State of Oklahoma are hereby made and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians, and against *all* rights and causes of action heretofore accrued or hereafter accruing to any such Indians or their heirs or grantees, *to the same extent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma,* • • •." Said italicized clause indicates quite clearly that Congress assumed, as was the case, that to some extent the aforesaid statutes of limitation were already applicable, but that to some extent they had never been applicable, and it therefore intended said section 2 to make said statutes applicable to the extent to which they were not theretofore applicable. If Congress had been under the impression that as to all restricted Indians the statutes of limitation had never been applicable, to any extent, it would only have been necessary to have said: "The statutes of limitation of the State of Oklahoma are hereby made applicable to all restricted Indians," without adding the foregoing italicized clause.

The foregoing construction which we contend should be placed upon section 2 of the act under consideration renders said section perfectly reasonable, whereas to follow the language of said section literally renders the same very unreasonable. For instance, if a full-blood Indian, who with respect to all of his allotted lands is unquestionably a "re-

stricted Indian", had sold a farm which he had purchased from his earnings, there is no question but what the statutes of limitation would run against his deed, however defective, but reading the aforesaid section literally, the same revived any and every cause of action which such Indian might have had to attack said sale, although the same had been fully barred many years prior to the passage of said section, because said section says, that "no cause of action" heretofore accruing to a "restricted Indian" shall be barred until two years after the Act of April 12, 1926. Likewise, in the case of *Tomlin* v. *Roberts, et al., supra,* Mary Tomlin was unquestionably a "restricted Indian", because her homestead allotment was absolutely inalienable, but the deed involved in that case covered her surplus allotment, which was absolutely alienable, but construing the aforesaid section literally, it had the effect of giving her an additional two years within which to attack her deed to her surplus allotment. Similarly, in the case by this court of *Joines* v. *Patterson, supra,* the Indians suing, according to appellant's position, were "restricted Indians", but this court held that their action was barred by the statutes of limitation, however, if the aforesaid section 2 is read literally, said Indians would have, by virtue of said section, and in spite of and after the decision of this court, the right to bring a new suit at any time within two years after the Act of April 12, 1926. To further illustrate the unreasonableness of appellant's construction, the Act of March 31, 1902 (32 Stat. 284), provided that where a deed was approved by the Secretary of the Interior covering lands patented to Indians, the statutes of limitation of the states in which such lands were situated should apply thereto, and if said act applied to the approved deed of a full-blood Indian of the

Five Civilized Tribes covering the allotment of such Indian, about which there has been some doubt, and if the Indian's action to attack said deed had been completely barred by said act, prior to the Act of April 12, 1926, nevertheless, a literal construction of section 2 of the Act of April 12, 1926, would revive such cause of action for a period of two years.

The foregoing illustrations demonstrate the unreasonableness of the position of appellant, and we think, force the conclusion that the Act of April 12, 1926, was not intended to apply to any cause of action, even though it be one in favor of a "restricted Indian", which, prior to said act, was subject to the statutes of limitation and was fully and completely barred thereby.

Finally, the construction which appellant seeks to place upon the act under consideration, to-wit: that said act extends the time within which an action may be brought, although the statutes of limitation had theretofore fully barred the same, would render said act invalid, in that it would deprive the appellees of their property without due process of law. 17 R. C. L., section 16, page 674; 37 C. J., section 14, page 697; and *Campbell* v. *Holt*, 115 U. S. 620, 29 L. ed. 483.

In the last of the above authorities, this court said:

> "It may, therefore, very well be held that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this

title to plaintiff, would be to deprive him of his property without due process of law."

V.

Criticism of Appellant's Arguments and Authorities.

What we have hereinbefore said answers most of the argument of appellant, and little more need be said.

In the final analysis, appellant's argument is that the Supreme Court of Oklahoma held herein that appellees had acquired the lands involved herein by prescription, and to permit appellent to be divested of his inherited lands in this manner is contrary to the provisions of the Act of May 27, 1908 (35 Stat. 312). In other words, the argument is that appellant was divested of his inherited lands by adverse possession, and nothing more. However, the Supreme Court of Oklahoma never either expressly or in effect held anything of the kind. Furthermore, its previous decisions are such as to justify the belief that it would not have entertained for one moment the contention that the lands involved herein could have been acquired simply by adverse possession and lapse of time. What said court did hold herein is simply that the County Court of Hughes County, Oklahoma, had jurisdiction and power to appoint a guardian for appellant and to approve the sale of his interest in the lands involved herein, and having made an order appointing John A. Jacobs as his guardian, and having approved the deed made by said guardian, and said deed having been recorded and the grantee therein having taken possession thereof, the statutes of limitation of the State of Oklahoma ran against any attack on said deed and had barred such attack prior to the Act of April 12, 1926 (44 Stat. 239), and that

said act did not revive appellant's right to attack said deed. This is all that said court held, and we submit that it is entirely different from holding that appellant's interest in said lands could be acquired solely and exclusively by adverse possession. Without an order appointing a guardian for appellant, and without an approved deed by the court having jurisdiction and power to approve the same, there is not the slightest question but what the Supreme Court of Oklahoma would have held that the statutes of limitation could not be interposed as a defense to any action by appellant to recover possession of said lands. That this is true is overwhelmingly established by numerous of the Oklahoma cases cited in appellant's brief.

Appellant contends that "until recently" the Supreme Court of Oklahoma held that the statutes of limitation were not applicable to an action by a full-blood Indian to recover his inherited lands, and cites many cases in support thereof. However, only one of the cases cited is anything like the case at bar. All of said cases, except *Lytle* v. *Fulotka,* 106 Okl. 86, 233 Pac. 456, involved an attempt to divest the Indian of his lands in contravention of some provision of an Act of Congress. Some were cases where the lands were not alienable at all, others where a sale was attempted through some court other than the County Court, others where title was sought to be divested solely by some judgment, and others where an Indian, who was a minor according to the Enrollment Records, had married or had the rights of majority conferred upon him by some Oklahoma District Court and then, relying upon the Oklahoma statutes to the effect that marriage or a decree of majority rights terminates minority, had made his individual deed, which was not ap-

proved by any court. In all such cases, the Oklahoma Supreme Court has always rightly held that the statutes of limitation were inapplicable. But these cases are as different from the case at bar as day is from night.

The opinion in *Lytle* v. *Fulotka, supra,* was written by a Supreme Court Commissioner, and while it involved a situation similar to the one in the case at bar, the Supreme Court of Oklahoma, in *Dierks* v. *Isaac, et al.,* 114 Okl. 158, 244 Pac. 750, in an opinion by Mr. Justice PHELPS, distinguished said case from one exactly like the case at bar, if it did not overrule the same. (See last two paragraphs of the opinion in *Dierks* v. *Isaac, et al., supra.*) In any event, the second line of authorities under the second preceding subdivision of this brief are subsequent and directly contrary to *Lytle* v. *Fulotka, supra.*

Appellant cites a number of cases in support of his contention that the lands involved herein were "restricted" and that he is, with respect to said lands, a "restricted Indian". However, in none of said cases, except *Kiker* v. *United States,* 63 F. (2d) 957, and *Conner* v. *Cornell,* 32 F. (2d) 581, was there involved any conveyance made by a full-blood Indian, or his guardian, and approved by any probate court, or a judge thereof, subsequent to the Act of May 27, 1908 (35 Stat. 312), of her inherited interest in the allotment of a deceased Indian. Moreover, in none of said cases was any question with respect to the statutes of limitation involved. The *Kiker* case merely sustains the right of the United States to sue for and on behalf of a full-blood Indian, and the *Conner* case, which was decided April 19, 1929 (*certiorari* denied by this court, 280 U. S. 583, 74 L. ed. 632), is a positive authority against appellant's con-

tention that the statutes of limitation were inapplicable to the case at bar. In that case the Eighth Circuit Court of Appeals applied the law of estoppel by a judgment of dismissal to an attempted attack upon an approved conveyance made by certain full-blood Indians after the Act of May 27, 1908 (35 Stat. 312), of their inherited interest in the allotment of a deceased Indian. Furthermore, we have heretofore seen that the same court, in *Harjo* v. *Empire Gas & Fuel Co.*, 28 F. (2d) 596, decided September 21, 1928, specifically held that the statutes of limitation were inapplicable to such a conveyance as is involved herein.

The whole difficulty with the position of appellant is that he refuses to recognize that the County Court of Hughes County, Oklahoma, acting as a federal agency, had full power and authority to appoint a guardian for him and to approve the deed of said guardian to his undivided interest in the lands involved herein, and having done these things, no matter how erroneously, there is nothing in any Act of Congress which militates against applying the statutes of limitation to such deed, nor anything to indicate that after appellant's cause of action, if any, was barred Congress intended to revive the same. If there had been no order appointing a guardian for appellant and no order of the proper County Court approving said guardian's deed, appellant's position would be absolutely sound, and the Supreme Court of Oklahoma would have been the first court to have so held.

Conclusion.

In view of the foregoing, we insist that either our motion to dismiss this appeal and to deny *certiorari* should be sustained or the judgment of the Supreme Court of Oklahoma herein should be affirmed.

Respectfully submitted,

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APPENDIX.

Laws Relating to Allotment and Alienation.

By the Original Creek Agreement, Act of March 1, 1901 (31 Stat. 861), as modified by the Creek Supplemental Agreement, Act of June 30, 1902 (32 Stat. 500), provision was made for the allotment and distribution of the Creek tribal lands and funds among the members of the tribe. An enrollment was to be made to *(a)* all members living on April 1, 1899, *(b)* all children born to members after that date, up to and including July 1, 1900, and living on the latter date, and *(c)* all children born to members after July 1, 1900, up to and including May 25, 1901, and living on the latter date. All who were so enrolled were to share in the allotment and distribution. A provision in the Act of March 3, 1905 (33 Stat. 1071), plainly intended to amend and supplement the earlier acts, authorized the inclusion of all children born between May 25, 1901, and March 4, 1905.

The Original Creek Agreement, Act of March 1, 1901 (31 Stat. 861), provides:

> *(Sec. 4.)* "Allotment for any minor may be selected by his father, mother, or guardian, in the order named, and shall not be sold during his minority. All guardians or curators appointed for minors and *incompetents* shall be citizens.
>
> "Allotments may be selected for prisoners, convicts, and aged and infirm persons by their duly appointed agents, and for *incompetents* by guardians, curators, or suitable persons akin to them, but it shall be the duty of said commission to see that such selections are made for the best interests of such parties.
>
> * * * * * * * *
>
> *(Sec. 28.)* "All citizens who were living on the first day of April, eighteen hundred and ninety-nine,

entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek nation, and be allotted and distributed to them accordingly.

* * * * * * * *

(Sec. 35.) "Parents shall be the natural guardians of their children, and shall act for them as such unless a guardian shall have been appointed by a court having jurisdiction; and parents so acting shall not be required to give bond as guardians unless by order of such court, but they, and all other persons having charge of lands, moneys, and other property belonging to minors and *incompetents*, shall be required to make proper accounting therefor in the court having jurisdiction thereof in manner deemed necessary for the preservation of such estates." (Italics ours.)

By section 6 of the Creek Supplemental Agreement, Act of June 30, 1902 (32 Stat. 500), the Arkansas law of descent and distribution was substituted for the Creek law, with a proviso that non-citizen heirs should not inherit unless there were no heirs of Creek descent. Said act further provides:

(Sec. 16.) "* * * Selections of homesteads for minors, prisoners, convicts, *incompetents*, and aged and infirm persons, who cannot select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him." (Italics ours.)

The Act of March 3, 1905 (33 Stat. 1048), provides:

"It shall be the duty of the Secretary of the Interior to investigate, or cause to be investigated, any lease of allotted land in the Indian Territory which he has reason to believe has been obtained by fraud, or in violation of the terms of existing agreements with any of the Five Civilized Tribes, and he shall in any such case where, in his opinion, the evidence warrants it, refer the matter to the Attorney General for suit in the proper United States court to cancel the same, and in all cases where it may appear to the court that any lease was obtained by fraud, or in violation of such agreements, judgments shall be rendered canceling the same, upon such terms and conditions as equity may prescribe, and it shall be allowable in cases where all parties in interest consent thereto to modify any lease and to continue the same as modified: *Provided*, no lease made by any administrator, executor, guardian, or curator which has been investigated by and has received the approval of the United States court having jurisdiction of the proceeding shall be subject to suit or proceeding by the Secretary of the Interior or Attorney General: *Provided, further*, no lease made by any administrator, executor, guardian, or curator shall be valid or enforcible without the approval of the court having jurisdiction of the proceeding."

The Act of April 26, 1906 (34 Stat. 137), provides:

(Sec. 5.) "That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effec-

tive, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same; *Provided*, the provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this act."

(Sec. 20.) "That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval; *Provided*, that allotments of minors and *incompetents* may be rented or leased under order of the proper court; *Provided, further*, that all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory." (Italics ours.)

(Sec. 22.) "That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such descedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper

court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

The Act of June 25, 1910 (36 Stat. 855), provides:

(Sec. 32.) "Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in pursuance of any tribal agreement or Act of Congress, to a person who had died, or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life."

The Act of May 27, 1908 (35 Stat. 312), provides:

(Sec. 1.) "That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as Freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hun-

dred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act. No restrictions of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled, 'An Act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes,' approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

(Sec. 2.) "That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or *incompetent*, for a period not to exceed five years, without the privilege of renewal: *Provided*, that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise; and, *provided, further*, that *the jurisdiction of the probate courts of the State of Oklahoma* over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twen-

ty-one years and all females under the age of eighteen years." (Italics ours.)

(Sec. 6.) "That the persons and property of minor allottees of the Five Civilizes Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. * * *"

(Sec. 9.) "*That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land; Provided*, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee; *Provided, further*, that if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one: but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the lands shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions; *Provided, further*, that the provisions of section twenty-three of the Act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section." (Italics ours.)

The above quoted provisions of the Acts of Congress very clearly indicate that Congress at all times presupposed

the jurisdiction of the probate courts in the Indian Territory and the State of Oklahoma to appoint guardians for minors and incompetent Indians and that such Indians in matters pertaining to the selection, allotment and alienation of their lands should act by and through such guardians. This is particularly manifested by section 2 of the Act of May 27, 1908 (35 Stat. 312).

Laws Relating to Jurisdiction of Probate Courts.

By section 6 of the General Allotment Act, approved February 8, 1887 (24 Stat. 388), as amended by the Act of March 3, 1901 (31 Stat. 868), "every Indian in Indian Territory" was "declared to be a citizen of the United States" and "entitled to all of the rights, privileges and immunities of such citizens."

The Act of March 1, 1889 (25 Stat. 783), provides:

> *(Sec. 31.)* "That certain general laws of the State of Arkansas in force at the close of the session of the general assembly in that state of eighteen hundred and eighty-three, as published in eighteen hundred and eighty-four in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act or with any law of Congress, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide, that is to say, the provisions of the said general statutes of Arkansas relating to administration, chapter one, and the United States court in the Indian Territory herein referred to shall have and exercise the powers of courts of probate under said laws; to public administrators, chapter two, * * * to guardians, curators, and wards, chapter seventy-three, and said court in the Indian Territory shall appoint guardians and curators; * * * to insane persons and drunkards, chapter eighty-two, and said court in the Indian Terri-

tory shall exercise the powers of the probate courts of Arkansas under this chapter; * * * and wherever in said laws of Arkansas the courts of record of said state are mentioned the said court in the Indian Territory shall be substituted therefor; and wherever the clerks of said courts are mentioned in said laws the clerk of said court in the Indian Territory and his deputies, respectively, shall be substituted therefor; * * *."

The Act of June 7, 1897 (30 Stat. 62), provides:

"That the commission appointed to negotiate with the Five Civilized Tribes in the Indian Territory shall examine and report to Congress whether the Mississippi Choctaws under their treaties are not entitled to all the rights of Choctaw citizenship except an interest in the Choctaw annuities.

"*Provided further,* that on and after January first, eighteen hundred and ninety-eight, the United States courts in said Territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted and all criminal causes for the punishment of any offense committed after January first, eighteen hundred and ninety-eight, by any person in said Territory, * * * and the United States commissioners in said Territory shall have and exercise the powers and jurisdiction already conferred upon them by existing laws of the United States as respects all persons and property in said Territory.

"And the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes; and any citizen of any one of said tribes otherwise qualified who can speak and understand the English language may serve as a juror in any of said courts."

The Act of April 28, 1904 (33 Stat. 573), provides:

> *(Sec. 2.)* "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, Freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the District Courts in said Territory in the settlements of all estates of decedents, the guardianships of minors and *incompetents*, whether Indians, Freedmen, or otherwise. That the sum of twenty thousand dollars is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the payment of salaries of the judges hereby authorized, the same to be immediately available." (Italics ours.)

Oklahoma, with boundaries including Indian Territory, came into the Union November 16, 1907. Thereupon, all laws then in force in the Indian Territory, except insofar as they were locally inapplicable or repugnant to the Oklahoma Constitution, were extended to the new state and the courts of original jurisdiction of said state became the successors of all courts of original jurisdiction in the Indian Territory. And since the admission of Oklahoma to statehood the County Courts thereof have had jurisdiction and power to appoint guardians for minors and incompetents and to authorize both sales and conveyances of their real estate. (See sections 19 and 20, Enabling Act, approved June 16, 1906 (34 Stat. 266), as amended by the Act of March 4, 1907 (34 Stat. 1286); sections 1, 12 and 13 of article VII, and sections 1, 2 and 33 of the Schedule, of the Constitution of Oklahoma; and article I, chapter 8, articles I, IV and VI of chapter 9, and article XIII of the Oklahoma Statutes, 1931.)

Oklahoma Statutes of Limitation.

Sections 99, 100 and 1444 of the Oklahoma Statutes, 1931, are as follows:

(Sec. 99.) "Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter:

* * * * * * * *

"*Second.* An action for the recovery of real property sold by executors, administrators or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of the deceased person, or the ward or his guardian, or any person claiming under any or either of them, by the title acquired after the date of the judgment or order, within five years after the date of the recording of the deed made in pursuance of the sale. * * *"

(Sec. 100.) "Any person entitled to bring an action for the recovery of real property, who may be under any legal disability when the cause of action accrues, may bring this action within two years after the disability is removed."

(Sec. 1444.) "No action for the recovery of any estate, sold by a guardian, can be maintained by the ward, or by any person claiming under him, unless it be commenced within three years next after the termination of the guardianship, or when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues within three years next after the removal thereof."

The Act of April 12, 1926 (44 Stat. 239).

The above act contains three sections. Section 1, among other things, provides:

> "* * * That all conveyances by full-blood Indian heirs heretofore approved by the County Courts shall be deemed and held to conclusively establish the jurisdiction of such courts to approve the same except where more than one such conveyance of the same interest in the same land has been made by the same Indian to different grantees and approved by county courts of different counties prior to the passage of this act, and except that this proviso shall not affect and may not be pleaded in any suit brought before the approval of this act."

Section 2 is as follows:

> "The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians, and against all rights and causes of action heretofore accrued or hereafter accruing to any such Indians, or their heirs or grantees, to the same extent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any such Indian, his or her heirs or grantees, either in his own behalf or by the government of the United States, or by any other party for his or her benefit, to the same extent as though such action were brought by or on behalf of any other citizen of said state; *Provided*, that no cause of action which heretofore shall have accrued to any such Indian shall be barred prior to the expiration of a period of two years from and after the approval of this act, even though the full statutory period of limitation shall already have run or shall expire during said

two years' period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years' period free from any bar of the statutes of limitations."

Section 3 makes provision for notifying the Superintendent of the Five Civilized Tribes of the pendency of any action in the United States courts in the State of Oklahoma or in the State of Oklahoma "to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervener, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes, or the proceeds, issues, rents, and profits derived from the same," and that the United States may then appear in such action and if the same is pending in a state court remove it to the federal court, where it shall proceed as if filed in such court, and further providing, subject to compliance with said section, that the United States shall be bound by the judgment in such cause "to the same extent as though no Indian land or question were involved."

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SUPREME COURT OF THE UNITED STATES.

No. 142.—October Term, 1934.

Noah Stewart, Appellant,
vs.
Robert Keyes, T. B. Slick, D. Replogle, et al.
} Appeal from the Supreme Court of the State of Oklahoma.

[May 20, 1935.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This was a suit brought in a court of Seminole County, Oklahoma, by a full-blood Creek Indian to recover an interest in land inherited from his grandmother, also a full-blood Creek Indian, and afterward sold by his guardian. The asserted grounds for a recovery were (1) that the proceedings whereby the plaintiff was adjudged an incompetent and subjected to guardianship on that basis, and also the proceedings leading to the sale, were invalid, because in some particulars irregular or not in accord with the laws of Oklahoma; (2) that the sale was in contravention of a controlling federal restriction on alienation; and (3) that an act of Congress of April 12, 1926, c. 115, § 2, 44 Stat. 239, permitted the suit to be brought within two years after the act's approval notwithstanding any bar which may have arisen under the state statutes of limitation before such approval.

The defendants answered and a trial was had at which judgment was given for them on a demurrer to the plaintiff's evidence. The Supreme Court of the State affirmed the judgment, 167 Okla. 531, and put its decision on the grounds (a) that the suit was barred by the state statutes of limitation and (b) that the act of Congress of April 12, 1926, relied on by the plaintiff as avoiding such a bar, could not be applied, because, if applied, it would deprive the defendants, who are holding under the guardian's sale, of vested rights without due process of law. The court's opinion did not mention the federal restriction on alienation set up by the plaintiff; but, of course, the judgment necessarily meant that the court regarded the asserted restriction as not requiring a different result.

The plaintiff brings the case here by appeal and complains that the Supreme Court of the State erred (1) in applying the state

statutes of limitation over his objection that they could not be applied without bringing them into conflict with the federal statute restricting alienation, and (2) in holding the act of Congress of April 12, 1926, invalid as applied to the situation disclosed.

The facts in the light of which these complaints are to be considered are as follows:

The plaintiff and his grandmother were full-blood Indians of the Creek Tribe, enrolled as such, and entitled to share in the allotment of the tribal lands among the members. She died before receiving her allotment, and after her death the land in question, which was part of the tribal lands, was allotted and patented in her right, the patent being issued to her "heirs" without naming them. Under the applicable statute the heirs received the land as an inheritance from her and not as an allotment in their own right.[1] The plaintiff was one of the heirs. He also received an allotment in his own right; and thus, like many others, he had a personal allotment as well as an interest in inherited land.

Thereafter, in 1907, the county court of Hughes County, Oklahoma, regularly appointed John A. Jacobs guardian of the plaintiff's person and estate, he then being a minor and that being the county of his residence. In 1914 that court entered an order (1) reciting it was made after a hearing in the plaintiff's presence and at which he was examined; (2) finding he was then over the age of 21 years, but was incompetent to manage his own affairs and still in need of a guardian; (3) also finding Jacobs, the then guardian, was a proper person to be continued as such; (4) declining to accept a resignation tendered by Jacobs; and (5) ordering that the guardianship be continued and that thereafter Jacobs should act "as guardian for Noah Stewart, incompetent", and should "be governed by the laws relating thereto".[1a] Jacobs assented; and the subsequent proceedings were all entitled "In the Matter of the Guardianship of Noah Stewart, an Incompetent".

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[1]The allotment in the right of the grandmother was made under § 28 of the act of 1901 which, after providing for the enrollment of all tribal citizens living on April 1, 1899, declares, "and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs . . . and be allotted and distributed to them accordingly."

[1a]See Mullen v. Glass, 43 Okl. 549; Yarbola v. Strough, 64 Okl. 195; Lytle v. Fulotka, 106 Okl. 86; Johnston v. Grey, 165 Okl. 156.

In May, 1916, the guardian by a verified petition requested the county court to authorize a sale of the plaintiff's interest in the inherited land for the purpose of securing money needed for his maintenance and support and for the improvement of his personal allotment. A month later the court entered an order reciting a hearing on that petition after lawful notice; finding the proposed sale was necessary for the purposes named; and directing the guardian to make the sale. Under that order the guardian made the sale at public auction to the highest bidder and reported it to the county court. July 11, 1916, the court entered an order (1) finding that due notice of the intended sale was given, that the sale was fairly conducted and legally made, and that the price was not disproportionate to the value of the property; (2) confirming and approving the sale; and (3) directing the guardian to execute a deed to the purchaser. The purchase price was paid to the guardian and he executed and delivered to the purchaser a deed, which was filed for record in the proper office July 12, 1916. The purchaser then entered into possession and he and his grantees remained in possession continuously thereafter. The defendants are the present claimants under the guardian's sale.

As part of the plaintiff's evidence it was stipulated that the Secretary of the Interior had never removed any restrictions on the alienation of the inherited land and that the same thing was true of the plaintiff's personal allotment. But the defendants, although joining in the stipulation, objected that the facts stipulated were immaterial.

August 4, 1917, the county court after a hearing entered an order adjudging that the plaintiff had become competent and discharging the guardian. The present suit was begun April 11, 1928.

The Supreme Court of the State in applying the state statutes of limitation said:

"Under the provisions of Section 1444, O. S. 1931, no action for the recovery of any estate, sold by a guardian, can be maintained by the ward, unless it is commenced within three years next after the termination of the guardianship, or when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof. The plaintiff could have commenced his action at any time within three years after August 4, 1917. Under the provisions of Section 100, O. S. 1931, any person entitled to bring an action for the recovery of real property, who may be under any legal disa-

bility when the cause of action accrues, may bring his action within two years after the disability is removed. Under that statute the plaintiff could have brought his action within two years after August 4, 1917. Under the provisions of the second subdivision of section 99, O. S. 1931, an action for the recovery of real property sold by a guardian upon an order or judgment of a court directing such sale, brought by the ward or his guardian, must be brought within five years after the date of the recording of the deed made in pursuance of the sale. Under that statute the plaintiff could have brought his action within five years after the 12th day of July, 1916."

Under the state statutes thus described the court held that the plaintiff's asserted right to call in question the guardian's sale was barred before the suit was begun and before the approval of the act of Congress of April 12, 1926.

1. Was the guardian's sale, as directed and approved by the county court, a forbidden alienation within the meaning of any then existing federal restriction? The plaintiff insists it was and points to the act of May 27, 1908, c. 199, 35 Stat. 312, as containing the restriction.

As a preliminary to considering that statute it will be helpful to refer to the conditions and legislation which preceded its enactment.

The Creek Tribe was one of the Five Civilized Tribes, each of which owned and occupied a tribal domain in the Indian Territory. Congress never provided a territorial government for that Territory, but ultimately did establish local courts therein and invested them with probate, as well as civil and criminal, jurisdiction. The laws for the Territory consisted largely of Arkansas statutes put in force therein by Congress; and these statutes included chapters providing comprehensively for the administration of estates of decedents, minors and incompetents, and for the sale of their property. At first the adopted Arkansas statutes were not intended to be fully applicable to Indians, but Congress soon made them applicable to all persons, "irrespective of race",[2] and later on declared that the courts in the Territory should have "full and complete jurisdiction" of all "estates of decedents, guardianships of minors and incompetents, whether Indians, freedmen, or otherwise".[3]

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[2] Act of June 7, 1897, c. 3, 30 Stat. 62, 83.
[3] Act of April 28, 1904, c. 1824, § 2, 33 Stat. 573.

November ~~7, 1908~~ 16, 1907, the Territory of Oklahoma and the Indian Territory were admitted into the Union as the State of Oklahoma under an enabling act passed by Congress June 16, 1906, c. 3335, 34 Stat. 267, and amended March 4, 1907, c. 2911, 34 Stat. 1286. The enabling act and the constitution of the new State united in declaring that, with exceptions not material here, "all laws in force in the Territory of Oklahoma" at the time of the State's admission should be "in force throughout the State" and that the "courts of original jurisdiction of such State" should be the successors of "all courts of original jurisdiction of said Territories".

The laws of the Territory of Oklahoma which were thus put in force "throughout" the new State included comprehensive provisions for the administration of estates of decedents, the appointment of guardians of minors and incompetents, and the management and sale of their property. In the Territory of Oklahoma jurisdiction over these subjects was vested in probate courts and by the constitution of the new State that jurisdiction was committed to county courts.

The lands of the Creek tribe were allotted among its enrolled members pursuant to the act of March 1, 1901, c. 676, 31 Stat. 861, as modified and supplemented by the acts of June 30, 1902, c. 1323, 32 Stat. 500, and March 3, 1905, c. 1479, 33 Stat. 1071. Under these acts lands allotted to living members in their own right were subjected to specified restrictions on alienation; but those allotted in the right of deceased members were left unrestricted.[4]

The act of April 26, 1906, c. 2876, 34 Stat. 137, substituted a system of revised restrictions made applicable to all of the Five Civilized Tribes. In § 19 it dealt with restrictions relating to lands of living allottees, and in § 22 with those relating to inherited lands, including, as this court has held, lands allotted in the right of deceased members.[5] Under § 22 the right of full-blood Indian heirs to alienate the inherited lands was subjected to the restriction that the conveyance be approved by the Secretary of the Interior.

The act of May 27, 1908, c. 199, 35 Stat. 312, again revised the restrictions and practically substituted its § 1 for § 19 of the act of 1906, and its § 9 for § 22 of that act. Thus, like the act of 1906,

[4]Skelton v. Dill, 235 U. S. 206; Adkins v. Arnold, 235 U. S. 417, 420; Talley v. Burgess, 246 U. S. 104, 107.
[5]Talley v. Burgess, supra, 108.

it dealt with the restrictions relating to lands of living allottees separately from those relating to inherited lands.

In § 1 the act of 1908, after declaring that certain lands of designated classes of allottees "shall be free from all restrictions", provides—

"All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

Counsel for the plaintiff place some reliance on that restriction. But there is no basis for doing so. The plaintiff's relation to the land in question was that of an heir, and not that of an allottee.[6] The land was allotted in the right of his deceased grandmother; so she rather than he should be regarded as the allottee.

Section 9 relates to the alienation of inherited lands. So far as is material here it provides:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

While this provision, if taken literally, might be regarded as confined to subsequent deaths and resulting heirships, a reading of the entire act, including its introductory sentence, shows that the purpose was to prescribe rules respecting future alienation by heirs—as well where they had become such before the act as where they might become such thereafter. The provision has been so applied by this Court.[7]

The first sentence in the quoted part of § 9, where not restrained by the proviso, undoubtedly frees the inherited lands from all restrictions on alienation. But as respects an heir who is a full-blood Indian the proviso obviously restrains that sentence and, if taken

[6] Harris v. Bell, 254 U. S. 103, 108.
[7] Harris v. Bell, 254 U. S. 103, 108, 114.

literally, makes unlawful any conveyance of any interest of such an heir in the inherited lands unless the conveyance be approved by the court having jurisdiction of the settlement of the estate of the deceased allottee. Here the heir was a full-blood Indian. So the question arises, whether the proviso is intended to include a conveyance made pursuant to a guardian's sale, such as was directed and approved by the county court in this instance.

The proviso makes no mention of minors or incompetents under guardianship or of conveyances made by their guardians under the direction of courts having jurisdiction of their estates. Under other acts of Congress the persons and estates of Indian minors and incompetents in the Indian Territory and the State of Oklahoma have long been subjected to the jurisdiction of local courts; and that jurisdiction is recognized throughout the allotment statutes before described and in § 2 of the act of 1908. True, that jurisdiction could not be exercised otherwise than in keeping with the laws of Congress relating to such Indians and their lands; but this constitutes no reason for putting aside the statutes granting and recognizing the jurisdiction when a related statute is being examined and construed.

The court which would have jurisdiction of the settlement of the estate of the deceased allottee (plaintiff's grandmother) is either the same county court that directed and approved the guardian's sale or the county court in an adjoining county. So, the court named in the proviso and the one which directed and approved the guardian's sale were either identical or of the same rank.

A similar question respecting the construction and application of the proviso was considered by this court in 1920. The case involved a sale of inherited land by the guardian of minor heirs who were full-blood Creek Indians, the guardian having acted under the order of the court having control of the guardianship; and it was held that the proviso, rightly construed, did not include such a sale.

In that case the Court said:[8]

"If in this instance the same court had had jurisdiction of the guardianship of the minor heirs and of the settlement of the estate of the deceased allottee, no embarrassment would have ensued; but as that was not the case, the question arises, whether it was essential that the guardian's conveyance, directed and approved, as it was, by the court having control of the guardianship, should

[8]Harris v. Bell, 254 U. S. 103, 112-113.

also be approved by the court having jurisdiction of the settlement of the deceased allottee's estate? The Circuit Court of Appeals answered in the negative; and, while the question is not free from difficulty, we think that solution of it is right.

"Of course, the purpose in requiring any approval is to safeguard the interests of the full-blood Indian heir. Where he is a minor he can convey only through a guardian, and no court is in a better situation to appreciate and safeguard his interests than the one wherein the guardianship is pending. Besides, as a general rule, a guardianship carries with it exclusive power to direct the guardian and to supervise the management and disposal of the ward's property. It is so in Oklahoma. This rule is so widely recognized and so well grounded in reason that a purpose to depart from it ought not to be assumed unless manifested by some very clear or explicit provision. . . . The proviso does not mention minors under guardianship; and to regard its general words as including them will either take all supervision of the sale of their interest in inherited lands from the court in which the guardianship is pending, or subject that court's action to the approval of another court of the same rank. In either event conflict and confusion will almost certainly ensue and be detrimental to the minor heirs. But, if the proviso be regarded, as well it may, as referring to heirs not under guardianship . . . all full-blood heirs will receive the measure of protection intended. We think this is the true construction."

In principle what was said there is applicable here. That the Indian heir in that case was a minor and in this was an incompetent is not material. The important thing, both there and here, is that the conveyance was made under the direction of the court having jurisdiction of a pending guardianship over the heir's estate. The guardianships were alike in point of congressional authorization and recognition, had like purposes, and were attended by like measures of control.

Plainly the proviso should be read in connection with the statutes whereby Congress authorized and recognized such guardianships and in the light of familiar rules of construction. Upon such a reading it becomes reasonably certain that the proviso, although couched in general terms, is not intended to include a conveyance made by the guardian of a minor or incompetent heir pursuant to a sale directed and approved by the court having control of the guardianship of the heir's estate.

The review which we have made of the federal restrictions shows that the guardian's sale was not a forbidden alienation under any of them.

2. We come then to the contention respecting the application of the state statutes of limitation. It proceeds on the assumption first, that the guardian's sale was in direct conflict with the federal restrictions on alienation; and, secondly, that the proceedings whereby the plaintiff was brought under guardianship as an incompetent, as also the later proceedings leading to the sale, were not in conformity with the state statutes and that these irregularities brought the sale in conflict with the restrictions.

We have already shown that the first assumption is not tenable. And we are of opinion the second is ill-grounded.

When Congress subjected Indian minors and incompetents and their estates to the laws of the State in respect of guardianships it did not thereby incorporate those laws into the federal restrictions. It merely gave its assent to their application to such Indians. The laws remained state laws, as before, and as such were to be applied to these Indians. Congress expressly imposed a limitation fixing stated ages of majority for them. This, of course, put that matter beyond the reach of the state statutes, and the courts of the State have so ruled. Apart from this limitation and some others not material here, the state laws have the same application to Indian guardianships that they have when the wards are minors or incompetents of other races.

Whether the proceedings in such Indian guardianships conform to the state statutes is a question of state, not federal, law. And, in the absence of congressional provision to the contrary, the time and mode of seeking the correction of errors believed to have been committed by the state courts in such proceedings, as also the effect of inaction in that regard, are all controlled by the state laws, as in the instance of other guardianship proceedings.

It follows from these considerations that, subject to a matter about to be considered, no federal statute or right was violated or infringed in applying the state statutes of limitation to this suit.

3. The remaining question is whether there was error in the ruling that the act of April 12, 1926, could not be given effect in this case without depriving the defendants of property contrary to the due process of law clause of the Constitution.

The defendants hold the rights transferred by the guardian's sale and deed. The deed was filed for record July 12, 1916, and the grantee then went into possession. The plaintiff had then attained

his majority but was under guardianship as an incompetent. That disability and guardianship terminated August 4, 1917. The guardian's sale and deed were not challenged until April 11, 1928, when this suit was begun. In the meantime any right the plaintiff may have had to challenge the sale and deed had become barred by § 1444 and subdivision 2 of § 100 of the state statutes of limitation. The bar became effective July 12, 1921, if not August 4, 1920, in that under the operation of those statutes the guardian's sale and deed then ripened into an unassailable title.

Section 2 of the act of April 12, 1926, declares that

"No cause of action which heretofore shall have accrued to" any restricted Indian of any of the Five Civilized Tribes "shall be barred prior to the expiration of a period of two years from and after the approval of this act, even though the full statutory period of limitation shall already have run or shall expire during said two years period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years period free from any bar of the statutes of limitations".

We are of opinion that so much of the section as purports to free from any bar of the statutes of limitation a cause of action such as is here presented, notwithstanding the full period of limitation had run prior to the act's approval, falls nothing short of an attempt arbitrarily to take property from one having a perfect title and to subject it to an extinguished claim of another.

As respects suits to recover real or personal property where the right of action has been barred by a statute of limitations and a later act has attempted to repeal or remove the bar after it became complete, the rule sustained by reason and preponderant authority is that the removing act cannot be given effect consistently with constitutional provisions forbidding a deprivation of property without due process of law.[9] "The reason is", as this Court has said, "that by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title, would be to deprive him of his property without due process of law."[10]

The state court so ruled in this suit and we sustain that ruling.

Judgment affirmed.

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[9]Cooley Const. Lim., 6th ed., p. 448.
[10]Campbell v. Holt, 115 U. S. 620, 623.